MOTION FILED
APR 16 1979

No. 78-711

In the Supreme Court of the United States

OCTOBER TERM, 1978

SOUTHEASTERN COMMUNITY COLLEGE, PETITIONER

v.

FRANCES B. DAVIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

PETER BUSCEMI
ANDREW J. LEVANDER
Assistants to the Solicitor General

BRIAN K. LANDSBERG
JESSICA DUNSAY SILVER
VINCENT F. O'ROURKE, JR.
STEPHEN L. MIKOCHIK
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Motion for Leave to File Brief Amicus Curiae	1
Interest of the United States	5
Questions presented	7
Statement	7
A. Facts	7
B. The district court proceedings	14
C. The decision of the court of appeals	16
Summary of Argument	19
Argument	25
I. Under Section 504 of the Rehabilitation Act of 1973, a handicapped person may be excluded from a federally funded post-secondary education program only if he does not meet essential requirements for admission to or participation in the program and could not do so even after feasible program modifications and even with the use of available educational aids	25
A. Introduction: The 1973 Act	25
B. The 1974 amendments	32
C. The HEW regulations	38
D. The 1978 amendments	44
II. The court of appeals correctly remanded this case to the district court for reconsideration in light of the regulations implementing Section 504	55

Argument—Continued

	Page
III. Respondent properly brought this suit to vindicate her rights under Section 504 of the Rehabilitation Act	68
A. Respondent's complaint states a cause of action on which relief can be granted	68
B. Recourse to HEW's administrative complaint procedure is not a prerequisite to a private suit under Section 504	77
Conclusion	81

CITATIONS

Cases:

Barnes v. *Converse College*, Civ. No. 77-1116 (D.S.C. Mar. 31, 1978)	75
Barnes v. *Converse College*, 436 F. Supp. 635	76
Bartels v. *Biernat*, 427 F. Supp. 226	75
Burgess v. *Joseph Schlitz Brewing Co.*, 250 S. E. 2d 687	64
Camenisch v. *University of Texas*, No. A-78-CA-061 (W.D. Tex. May 17, 1978)	75
Campbell v. *Kruse*, 434 U.S. 808	74
Cherry v. *Mathews*, 419 F. Supp. 922	38
Crawford v. *University of North Carolina*, 440 F. Supp. 1047	75
Davis v. *Bucher*, 451 F. Supp. 791	75
Doe v. *New York University*, 442 F. Supp. 522	75
FHA v. *The Darlington, Inc.*, 358 U.S. 84	71
Glidden Co. v. *Zdanok*, 370 U.S. 530	71

Cases—Continued

	Page
Hairston v. *Drosick*, 423 F. Supp. 180	75
Kampmeier v. *Nyquist*, 553 F.2d 296	75
Lau v. *Nichols*, 414 U.S. 563	35, 67
Leary v. *Crapsey*, 566 F.2d 863	74
Lloyd v. *Regional Transportation Authority*, 548 F.2d 1277	75
Lynch v. *Household Finance Corp.*, 405 U.S. 538	69
Oklahoma v. *Civil Service Commission*, 330 U.S. 127	67
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367	55
Regents of the University of California v. *Bakke*, No. 76-811 (June 28, 1978)	73
Trageser v. *Libbie Rehabilitation Center*, 590 F.2d 87, petition for cert. pending, No. 78-1454	70, 76, 77
Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63	67, 68
United Handicapped Federation v. *Andre*, 558 F.2d 413	74
U.S. v. *San Francisco*, 310 U.S. 16	67
Vanko v. *Finley*, 440 F. Supp. 656	75
Whitaker v. *Board of Higher Education*, 461 F. Supp. 99	75

Constitution, statutes and regulations:

United States Constitution, Fourteenth Amendment	14
Civil Rights Act of 1964:	
Title VI, Section 601, 42 U.S.C. 2000d	28, 35, 70, 73, 77, 78
Title VII, Section 701, 42 U.S.C. 2000e	67

Constitution, statutes and regulations—Continued — Page

Education Amendments of 1972, Title IX, Section 901, 20 U.S.C. 1681 ....28, 70, 71, 79-80
Rehabilitation Act Extension of 1976, Pub. L. No. 94-230, 90 Stat. 211 45
Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* 25

Section 3, 29 U.S.C. 702 26
Section 7, 29 U.S.C. 706 38
Section 7(6), 29 U.S.C. 706(6) 32
Title I, 29 U.S.C. 720-750 26
Title II, 29 U.S.C. 760-764 26
Title III, 29 U.S.C. 770-776 26

Section 304(b), 29 U.S.C. 774 (b) 26
Section 304(d) (to be codified at 29 U.S.C. 774(d)) 53
Section 305, 29 U.S.C. 775 26
Section 305 (to be codified at 29 U.S.C. 775) 52
Section 305(a)(2) (to be codified at 29 U.S.C. 775(a)(2)).. 22, 53
Section 314 (to be codified at 29 U.S.C. 777d) 53
Section 315 (to be codified at 29 U.S.C. 777e) 53

Title IV, 29 U.S.C. 780-787:

Sections 400-402, 29 U.S.C. 780-782 27
Section 401(d), 29 U.S.C. 781 (d) 27
Sections 404-407, 29 U.S.C. 784-787 27

Constitution, statutes and regulations—Continued — Page

Title V, 29 U.S.C. 790-794:

Section 501(a), 29 U.S.C. 791 (a) 27
Section 501(b), 29 U.S.C. 791 (b) 27
Section 501(c), 29 U.S.C. 791 (c) 27
Section 502, 29 U.S.C. 792 27
Section 503(a), 29 U.S.C. 793 (a) 27, 33, 34, 35
Section 504, 29 U.S.C. 794 .....*passim*
Section 505(a)(2) (to be codified at 29 U.S.C. 794a(a)(2)) 73
Section 505(b) (to be codified at 29 U.S.C. 794a(b)) 72
Section 507 (to be codified at 29 U.S.C. 794c) 52

Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955 *et seq.*:

Section 101(a), 92 Stat. 2955 44
Section 104(b)(4), 92 Stat. 2960 53
Section 111, 92 Stat. 2966 53
Section 111(b)(10), 92 Stat. 2967.... 53
Section 114(3), 92 Stat. 2970-2971.. 53
Section 115(a), 92 Stat. 2971 52
Section 116(2), 92 Stat. 2975-2976.... 53
Section 118(d), 92 Stat. 2981 51
Section 119(2), 92 Stat. 2982 47
Section 120, 92 Stat. 2983-2984.....52, 72, 73

Constitution, statutes and regulations—Continued

	Page
Smith-Fess Act, 41 Stat. 735	25
Standards for Educational Units in Nursing, ch. 90, art. 9 (1975)	63
57 Stat. 374	26
68 Stat. 652	26
79 Stat. 286	26
79 Stat. 408	26
79 Stat. 1282	26
81 Stat. 250	26
82 Stat. 297	26
87 Stat. 361	32
28 U.S.C. 1337	69
28 U.S.C. 1343(4)	69
42 U.S.C. 1983	14, 23, 68, 69, 70, 76
N.C. Gen. Stat. art. 9 (1975 Repl.):	
§ 90-158 *et seq.*	62
§ 90-170	62
§ 90-171.5(7)	63
§ 90.171.7	63
N.C. Gen. Stat. § 168-6 (1976 Repl.)	64
1977 N.C. Sess. Laws, ch. 712, § 3	64
41 C.F.R. Part 60-741	34
45 C.F.R. 80.6-80.10	78
45 C.F.R. 80.8	6
45 C.F.R. Part 81	78
45 C.F.R. Part 84	6, 39
45 C.F.R. Part 84, Appendix A	40, 40-41, 43, 44
45 C.F.R. 84.3	39
45 C.F.R. 84.3(j)(1)	38
45 C.F.R. 84.3(j)(2)(i)-(iv)	38
45 C.F.R. 84.3(k)(3)	16, 39, 40, 41, 57
45 C.F.R. 84.4(a)	39

Constitution, statutes and regulations—Continued

	Page
45 C.F.R. 84.4(b)(1)	39
45 C.F.R. 84.4(b)(2)	39
45 C.F.R. 84.10	39, 40
45 C.F.R. 84.10(a)	39, 42, 67
45 C.F.R. 84.10(b)	39
45 C.F.R. 84.41-84.47	40
45 C.F.R. 84.42(b)(2)	40, 41, 57
45 C.F.R. 84.42(b)(4)	40, 41
45 C.F.R. 84.44	41
45 C.F.R. 84.44(a)	17, 41, 42, 43
45 C.F.R. 84.44(d)	43, 44
45 C.F.R. 84.44(d)(1)	17
45 C.F.R. 84.44(d)(2)	44
45 C.F.R. 84.61	6, 78
45 C.F.R. Part 85	6, 38
45 C.F.R. 86.71	78
Miscellaneous:	
124 Cong. Rec. (daily ed. May 16, 1978):	
p. H3969	50
p. H3974	50
124 Cong. Rec. (daily ed. Sept. 20, 1978):	
p. S15548	50
p. S15590	69
pp. S15590-S15591	72
p. S15993	72
124 Cong. Rec. (daily ed. Oct. 14, 1978):	
p. H13473	49
pp. H13474-H13475	50

Miscellaneous—Continued Page

p. S18997 50
pp. S18999-S19000 73

Exec. Order No. 11758, 39 Fed. Reg. 2075 (1974) 34
Exec. Order No. 11914, 41 Fed. Reg. 17871 (1976) 6, 38
35 Fed. Reg. 11595 (1970) 35
39 Fed. Reg. 20566 (1974) 34
H.R. Conf. Rep. No. 95-1780, 95th Cong., 2d Sess. (1978) 47, 54
H.R. Rep. No. 94-721, 94th Cong., 1st Sess. (1975) 45
H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. 34 ..... 50, 54
Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) ..46, 47-48, 54, 74, 79
Oversight Hearings on the Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 2d Sess. (1978) 54
Rehabilitation Act of 1972: Hearings on H.R. 8395 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. (1972) 31

Miscellaneous—Continued Page

Rehabilitation Extension Amendments of 1977: Hearings on S. 1712 and S. 1596 Before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977) 47
Rehabilitation Amendments of 1978: Hearings on S. 2600 Before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources, 95th Cong., 2d Sess. (1978) 54
S. Rep. No. 93-318, 93d Cong., 1st Sess. (1973) 26, 31
S. Rep. No. 93-319, 93d Cong., 1st Sess. (1973) 31
S. Rep. No. 93-1139, 93d Cong., 2d Sess. (1974) 24, 71
S. Rep. No. 93-1297, 93d Cong., 2d Sess. (1974) 33, 34, 35, 36, 71, 73
S. Rep. No. 95-890, 95th Cong., 2d Sess. (1978) 50, 51, 54, 69

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE, PETITIONER

v.

FRANCES B. DAVIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Solicitor General, on behalf of the United States, moves this Court for leave to file a brief as amicus curiae after the time limit specified by Rule 42(2) of the Rules of the Supreme Court. Cf. Rule 42(4).

This case raises important questions under the Rehabilitation Act of 1973, and will be the first case decided by this Court under that Act. The United States has not previously filed a brief in this case. Formulating a position on the issues involved

has required careful examination of the extensive legislative history of the Act and its 1974 and 1978 amendments, as well as analysis of the extensive regulations issued under Section 504 of the Act, after the district court's decision in this case, by the Department of Health, Education, and Welfare. Consultation between lawyers in that Department and in the Department of Justice has also been required.

While the United States has substantially improved the timeliness of its filings in this Court during the present Term, the preparation of amicus briefs in cases with which the government has not been familiar and in which it has not previously formulated a position has for many years presented special problems. These problems have been compounded this Term by the current state of the Court's docket, which has permitted very few extensions of time to be granted for the filing of briefs on the merits, either in our own cases or in the many additional cases in which we have concluded that it is in the public interest to state the views of the United States as amicus curiae. And, as it happens, the United States was called upon to file briefs in an unusually large number of cases to be heard in the March and April argument sessions—approximately 12 in March, followed by approximately 16 in April.

While we are acutely aware of our obligation to minimize inconvenience or unfairness to the parties before the Court, we must also be conscious of our duty to the Court, to the Congress, and to the many individuals and institutions that will be affected by

this Court's decisions, to formulate the position of the United States with fairness and due care and, in statutory cases, with fidelity to the congressional intent. While we regret that the effort to do so in this case extended beyond the time specified in this Court's rules,* we believe that the views of the United States on the important federal statutory issues involved in this case should be before the Court and the parties and that they will assist the Court in resolving the questions presented.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1979

---

* Respondent's brief is dated March 31, 1979. On April 13, 1979, we hand-delivered to counsel for the petitioner in Chapel Hill, North Carolina, a typescript copy of most of our brief, together with a copy of our briefs in *Cannon* v. *The University of Chicago* (No. 77-926), on which the remainder of our brief was to be based. A complete typescript (except for summary of argument) was mailed to the parties on Saturday, April 14, 1979, and the completed typescript was submitted to the Court on Monday, April 16, 1979, with printed copies to follow as soon as available.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE, PETITIONER

v.

FRANCES B. DAVIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, prohibits discrimination against the handicapped in "any program or activity receiving Federal financial assistance or * * * conducted by any Executive agency or by the United States Postal Service." The statute requires each executive agency to promulgate regulations governing enforcement of the antidiscrimination provision with-

in the federal government. In addition, the United States Department of Health, Education, and Welfare (HEW) has substantial responsibility for implementing Section 504 in connection with federally funded programs conducted by private institutions and state and local governments. Exec. Order No. 11914, 41 Fed. Reg. 17871 (1976), directed the Secretary of HEW to "establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504." The Secretary was also instructed to "coordinate the implementation of section 504 * * * by all Federal departments and agencies empowered to extend Federal financial assistance to any program or activity * * * and [to] consult with such departments and agencies, as necessary, so that consistent policies, practices, and procedures are adopted with respect to the enforcement of section 504." In the exercise of his responsibility under the Executive Order, the Secretary has issued detailed regulations. See 45 C.F.R. Parts 84 and 85. Under the Secretary's regulations, federal grant agencies that detect actual or threatened violations of Section 504 may refer the matter to the Department of Justice with a recommendation that appropriate judicial proceedings be brought to enforce the rights of the United States under the statute. See 45 C.F.R. 84.61 and 45 C.F.R. 80.8.

This case concerns the interpretation of the anti-discrimination provision in Section 504. The Court's decision may also affect the validity of the administrative construction given the statute in HEW's regulations. Because the regulations and the statute directly affect the actions of all federal agencies and all recipients of federal funds, the United States has a substantial interest in this case.

QUESTIONS PRESENTED

1. Whether the court of appeals properly remanded respondent's suit to the district court for reconsideration in light of new federal regulations implementing Section 504 of the Rehabilitation Act of 1973.

2. Whether respondent is entitled to enforce her rights under Section 504 in a private judicial proceeding.

3. If so, whether respondent is required first to exhaust any available administrative remedies provided by a federal funding agency.

STATEMENT

A. Facts

Petitioner Southeastern Community College is a public educational institution in Whiteville, Columbus County, North Carolina. The school offers programs in "various fields of vocational and professional instruction" and receives "various forms of Federal financial assistance" (A. 17a). Respondent is a licensed practical nurse and a citizen and resident of North Carolina. She received her professional license from the State in 1967, and the license is currently in good standing. Since she received her license, re-

spondent "has from time to time been actively engaged and employed" as a practical nurse (*ibid.*). She is 46 years old (A. 116a, 117a).

In March 1973, respondent applied for admission to Southeastern Community College (A. 116a-122a). She indicated on her application that she planned to study nursing. As part of her application, respondent submitted a "Pre-Entrance Medical Record" on which her family physician noted that she had "some decrease in hearing"; he also stated that she had no handicap and that she was justified in undertaking the program in professional nursing (A. 119a-120a). Also as part of the application process, respondent was interviewed by a representative of the College. In her written report of the interview (A. 154a-157a), the College official observed that respondent had a "hearing difficulty" and was "very difficult to interview [because she r]equested repeat of almost all statements—though we were sitting face to face." The interviewer reported further that the problem continued even after she attempted to compensate for respondent's hearing loss (A. 155a). Notwithstanding the interviewer's low rating of respondent's "[a]bility to communicate" (A. 154a), she was accepted for admission to petitioner's College Parallel program, a course of study designed to prepare students for admission to the College's Associate Degree Nursing Program (Pet. App. 13a). In the letter of acceptance sent to respondent, petitioner stated (A. 123a):

> It is our understanding that you would like to enter the Associate Degree Nursing Program in September of 1974. If so, your progress will be evaluated at the end of this year to determine your acceptance into the nursing program. If you are accepted, your program will still require two additional years after this year.

During the academic year 1973-1974, respondent successfully completed the College Parallel program and in the spring of 1974 College officials considered her for admission to the Associate Degree Nursing Program. The latter program entails both classroom and clinical instruction (A. 49a-51a) and is intended to train students for certification as registered nurses (Pet. App. 3a). Respondent apparently did not file a separate application for the Associate Degree program (A. 36a-37a), but in March 1974 she was interviewed by a College official seeking to evaluate her fitness for nurse's training. The written report of this interview is reproduced in the Appendix filed by the parties in this Court (A. 158a-161a; see also A. 27a-32a). The interviewer stressed respondent's hearing difficulty and asserted that she would encounter problems in the Associate Degree program because of her inability to hear normally.

The College's admissions committee met in April 1974 and reached a preliminary decision to deny respondent's application. The committee requested that respondent provide more specific information about her hearing ability and told respondent that she

could be examined by a physician of her choice (A. 37a). In accordance with the committee's request, respondent was examined by an audiologist at the Duke University Medical Center in Durham, North Carolina. The doctor's reports indicated that respondent has a moderately severe bilateral sensori-neural hearing loss and a speech discrimination loss that make it difficult for her to understand speech because of the distortion in her hearing (A. 124a, 127a). The audiologist determined that the hearing aid then being worn by respondent provided little or no help (A. 125a) but that a proper hearing aid would improve her hearing to a level at the outer limits of the normal range (A. 125a, 127a-128a). The doctor further stated that respondent is an excellent lip reader who can perform satisfactorily in most listening situations if she is permitted to see the speaker and to use her vision for assistance in interpreting speech (A. 128a; see also Pet. App. 14a-15a).

Based on the audiologist's diagnosis, the College's admissions committee determined that respondent did not qualify for the Associate Degree Nursing Program. The committee notified respondent of its decision (A. 129a-130a), and the decision was subsequently ratified by the full nursing faculty (A. 69a-71a). The faculty members believed that respondent's need to rely on her lip reading ability would prevent her from participating safely in certain clinical portions of the nursing program and in professional situations in which doctors and nurses wear surgical masks or

in which communications are hurried (A. 29a, 31a, 34a, 71a, 76a, 89a, 96a).

Before respondent's application was considered by the full eight-member faculty, the director of the College's nursing program asked the Executive Director of the State Board of Nursing for the Board's opinion regarding respondent's ability to participate safely in the program. In a telephone conversation, the Executive Director indicated that she shared the admissions committee's concern that respondent's hearing disability might preclude her safe participation. Before a written response was received from the State Board, the faculty decided not to admit respondent (A. 70a). Shortly thereafter, the College received a letter from the State Board's Executive Director (A. 132a-134a). She wrote:

> We concur with your opinion as stated on the telephone, that [respondent's] hearing disability can preclude her being safe for practice in any setting allowed by a license as an RN, or by a license as LPN. Moreover, we would question the advisability of you and the faculty's assuming responsibility for [respondent's] involvement in patient care as a student in nursing. To adjust patient learning experiences in keeping with [respondent's] hearing limitations could, in fact, be the same as denying her full learning to meet the objectives of your nursing programs.
>
> * * * * *
>
> Both you and I can identify innumerable patient care situations in which this lady's abilities * * * would be inadequate to respond to the patient needs; in fact, it would be inadequate for

her probably to identify all of the patient's needs for which she would be accountable or even to pick up some clues to situations that could be quite critical to the point of life, death, situations.

* * * * *

[W]e do not believe, on the basis of facts we have now, that [respondent] would either be safe for herself, or for patients, or for faculty to pursue a nursing education program.

In June 1974 respondent asked the College to reconsider her application (Pet. App. 16a; A. 63a-64a). At petitioner's request, respondent communicated with Southeastern General Hospital (A. 67a), one of the facilities in which the nursing program's clinical training was conducted (A. 46a); respondent inquired whether the hospital would employ her if she became a registered nurse. The Director of Nursing Service at the hospital stated that there were a number of positions both inside and outside the hospital in which respondent could function adequately as a registered nurse (A. 140a-141a; 144a-145a).[1]

[1] The Director's letter (A. 141a) observed that "[o]n a busy, noisy unit it would be difficult [for respondent to function adequately] but in areas such as long term care, a doctor's office or even industrial she could do well." To the College's specific inquiry whether respondent could be employed at Southeastern General, the Director replied that she would employ respondent in the hospital's Skilled Nursing Facility if a vacancy became available there. The Director also stated that respondent could handle positions in the new Methodist Home or on night assignment in the hospital's Post Partum Unit (A. 144a-145a). The Director's letter did not indicate that any additional supervision would be required to enable respondent to perform her responsibilities in those positions.

In the course of reconsidering respondent's application, petitioner asked the North Carolina Board of Nursing whether respondent could be licensed as an RN if she successfully completed the Associate Degree Nursing Program (A. 137a). The Board's Executive Director responded (A. 138a-139a):

[O]ne requirement for eligibility to write the State Board Test Pool Examination leading to licensure as registered nurse (or to licensed practical nurse where appropriate) includes evidence that an applicant has no limitations, physically, emotionally, or mentally to prevent the applicant from practicing nursing after licensure without restriction of any kind on the license. * * * [I]t is our opinion that [respondent] has hearing limitations which could interfere with her safely caring for patients. * * *

* * * * *

We cannot, at this time predict eligibility or ineligibility for the licensing examination should [respondent] enroll in, and be allowed to complete the program some several years hence.

After reviewing the available information, the College adhered to its earlier decision on respondent's application. Petitioner's Dean for Student Development wrote to respondent and informed her of the school's action. He stated (A. 147a-148a):

On the basis of the audiologist's report; the reservations noted earlier from the North Carolina Board of Nursing; and conferences with you, in which your hearing difficulty was noted and discussed; members of the Southeastern

Community College Nursing faculty are not willing to accept you as a student in the Associate Degree Nursing Program. A basic inconsistency which they noted is the fact that your hearing limitation would require restricted or limited clinical experiences as a student and the North Carolina Board of Nursing requires that no limitations be placed on the possible licensure of applicants.

B. The District Court Proceedings

In September 1975 respondent filed this suit in the United States District Court for the Eastern District of North Carolina. Her complaint alleged that petitioner, acting under color of law, rejected her application for admission to the nursing program on the basis of her hearing disability, and thereby denied her her rights under the Constitution and laws of the United States (A. 2a-9a). Respondent's complaint alleged (A. 5a) that her cause of action arose under 42 U.S.C. 1983.

Based on documentary evidence introduced by respondent and documentary and testimonial evidence introduced by petitioner, the district court found that the College did not deprive respondent of her rights under either the Fourteenth Amendment or Section 504 of the Rehabilitation Act of 1973 and therefore that no violation of 42 U.S.C. 1983 had been established (Pet. App. 12a-21a).

The court rejected respondent's constitutional claim on the ground that petitioner's decision to deny her admission was not arbitrary or capricious, but rather

was based on respondent's "projected inability to be licensed as a Registered Nurse after graduation" and on petitioner's conclusion that "it would be difficult and, in fact, dangerous for plaintiff to even attempt the clinical portion of the training program" (Pet. App. 18a).

The district court rejected respondent's Section 504 claim on similar grounds. The court interpreted the statute to mean that "no person may be excluded from a federally assisted program or activity solely by reason of the fact that such person is handicapped, unless the nature of the handicap, renders the person unable to fully and effectively participate in the activity" (Pet. App. 20a). The court stated (*ibid.*) that an "otherwise qualified handicapped individual" within the meaning of Section 504 is one who is "able to function sufficiently in the position sought *in spite of* the handicap, if proper training and facilities are suitable and available" (emphasis added). In the court's view, "[t]he major problem with [respondent's] contention is that her handicap actually prevents her from safely performing in both her training program and her proposed profession" (*ibid.*).

The court acknowledged that one of petitioner's faculty members conceded on cross-examination that "with special training and individual supervision [respondent] could perform adequately in some selected fields of nursing" (*ibid.*; see A. 73a-74a; see also A. 53a). But the possibility that respondent, given some special attention, might be able to complete the nursing program successfully and function

satisfactorily in some professional situations did not affect the district court's decision. The court simply concluded that, because respondent cannot participate fully in the existing program without some accommodation, petitioner's rejection of her application did not violate Section 504.

C. The Decision of the Court of Appeals

The court of appeals reversed and remanded for further consideration in light of the implementing regulations promulgated under Section 504 several months after the district court's ruling (Pet. App. 5a-9a). The court noted that under the newly adopted HEW regulations, handicapped persons "otherwise qualified" for post-secondary and vocational education services are those "who meet[] the academic and technical standards requisite to admission or participation in [a federally funded] education program or activity." 45 C.F.R. 84.3(k)(3). In turn, the court observed (Pet. App. 7a), the regulations define "technical standards" as "all nonacademic admissions criteria that are essential to participation in the program in question." Perhaps under the impression that "technical standards" under the HEW regulations cannot include a requirement that an individual be able to perform physical tasks or functions essential to a particular program, the court held that "the college must reconsider [respondent's] application for admission to the nursing program *without regard to* her hearing disability" (Pet. App. 5a; emphasis added). The court also stated that "the

district court erred by considering the nature of [respondent's] handicap in order to determine whether or not she was 'otherwise qualified' for admittance to the nursing program" (Pet. App. 7a). The court expressed no opinion concerning respondent's "scholastic suitability" for nursing studies and emphasized that respondent's "past academic performances would undoubtedly be a highly relevant factor" among the many objective and subjective factors that petitioner may properly consider in making its admission decision (Pet. App. 5a & n.5).

In response to petitioner's argument that the College was not prepared to provide adequate supervision for respondent during her clinical training and could not modify its program to compensate for her hearing disability (see, *e.g.*, A. 53a, 77a), the court of appeals directed the district court on remand to give close attention to HEW regulations dealing with the need for modification of academic requirements in certain circumstances to avoid discrimination against the handicapped (Pet. App. 9a; see 45 C.F.R. 84.44(a)). The court also observed that under HEW's regulations (45 C.F.R. 84.44(d)(1)) handicapped students should not be excluded from federally funded education programs "because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills." The court repeatedly stressed that the correct application of the new regulations to respondent's situation should be determined in the first instance by the district court. The court of appeals did not specify

the extent to which petitioner might be required to modify its nursing program in order to avoid discriminating against the handicapped in violation of Section 504.

With respect to the procedural questions potentially presented by respondent's suit, the court of appeals announced first that it agreed with the district court's implicit determination that a private plaintiff may pursue a cause of action under Section 504, even though the statute does not in terms authorize enforcement through private litigation (Pet. App. 3a-4a). The court of appeals also suggested that on remand the district court might wish to examine the possible interaction between the administrative enforcement mechanism established by HEW's regulations and private lawsuits under Section 504. In particular, the court of appeals posed the following questions for the district court's consideration (Pet. App. 11a n.9):

> (1) What is the effective date concerning the relevant sections of the HEW regulations, if any? (2) Did the promulgation of the Section 504 regulations by HEW * * * create administrative relief that must be exhausted? (3) Is the doctrine of "primary jurisdiction" applicable, and if so, how? (4) Should administrative exhaustion and/or "primary jurisdiction" be applicable, should plaintiff be awarded any relief *pendente lite?*

With one judge dissenting, the court of appeals panel denied rehearing (Pet. App. 1a). Two judges

of the court of appeals who were not members of the panel voted to grant rehearing en banc and indicated that they would affirm the judgment of the district court (*ibid.*).

SUMMARY OF ARGUMENT

I

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against the handicapped in programs or activities receiving federal financial assistance. The statute provides that "[n]o otherwise qualified handicapped individual" shall be excluded from a federally funded program "solely by reason of his handicap." Although it is modeled on other antidiscrimination provisions concerning race, national origin, and sex, Section 504 presents special interpretive problems because it forbids recipients of federal funds from discriminating on the basis of a personal characteristic, physical disability, that in many cases may affect a person's capacity to participate in a particular program or activity.

In enacting Section 504, Congress did not intend to protect only those handicapped persons who can participate fully in existing programs, without any adjustment in program requirements and without any auxiliary aids. On the other hand, Congress also did not mean to require that federally funded programs accept all handicapped persons who meet the nonphysical requirements for a particular job or course of study, even if their physical disabilities prevent

them from completing tasks essential to their employment or education. Rather, Congress designed Section 504 to require recipients of federal funds to make a positive effort to accommodate the handicapped and to implement feasible program modifications where such measures will render funded activities more accessible to handicapped persons.

The legislative history of the 1973 Act provides virtually no guidance for the interpretation and application of Section 504. The materials accompanying the 1974 amendments to the Act are more informative, however. These amendments were produced by the same Congress that originally passed the Rehabilitation Act one year earlier. The committee report on the amendments is, therefore, a highly authoritative aid to the proper construction of Section 504. The report establishes that, in enacting Section 504, Congress intended not only to prohibit discrimination against handicapped persons, but also to require affirmative action on their behalf. Furthermore, the report shows that Congress explicitly directed the Secretary of HEW to issue regulations governing the implementation of Section 504 and to assume responsibility for coordinating the statute's enforcement.

The implementing regulations were promulgated in April 1977. They make clear that, in conducting a postsecondary education program, a recipient of federal funds may restrict admission to persons who can meet all academic and nonacademic criteria essential for participation in the program. If the ability to perform a particular physical task or function is an

essential requirement for participation, then the recipient may insist that that requirement be met by all persons applying for admission, including handicapped persons. But the regulations also provide that persons and institutions receiving federal financial assistance must undertake affirmative efforts to enable the handicapped to participate in funded programs. Recipients must consider the possibility of modifying program requirements to accommodate the handicapped and must make adjustments in existing programs where it is feasible to do so consistent with the need to preserve the programs' essential standards. Fund recipients are also obliged to ensure that handicapped students are not excluded from education programs because of the absence of educational auxiliary aids, such as videotapes or interpreters for the deaf and readers or Braille texts for the blind.

The 1978 amendments to the Rehabilitation Act and the supporting legislative materials demonstrate that the interpretation of Section 504 in the HEW regulations accords with congressional intent. The regulations were submitted to Congress for criticism and comment both before they were issued and at the time of issuance. Congress registered no objection. Moreover, in House hearings on Section 504 conducted several months after promulgation of the regulations, testimony focused on the cost of compliance with the statute, not on the question whether Section 504 requires affirmative efforts on behalf of the handicapped by recipients of federal financial assistance. The latter point was simply assumed by committee members and witnesses alike. The floor debates and com-

mittee reports on the 1978 amendments also reflect Congress' understanding that Section 504 does obligate fund recipients to make feasible modifications in their programs to accommodate handicapped persons. The amendments themselves confirm this view. The new Section 305(a)(2) of the Act authorizes grants to states for the purpose of providing aid to public and private nonprofit entities seeking to comply with Section 504. One form of assistance specifically mentioned in the statute is the provision of interpreters for the deaf.

II

The district court decided this case before HEW issued its regulations implementing Section 504. As a consequence, the court did not address the critical questions that must be answered in resolving respondent's statutory claim. The court assumed that Section 504 protects only those handicapped persons who can fully participate in existing programs, without adjustments in program requirements and without the provision of auxiliary aids. The court therefore did not consider whether the clinical portions of petitioner's nursing program can be modified to permit respondent to participate or whether respondent could function adequately in a clinical setting with educational aids, such as interpreter services. Accordingly, the court of appeals correctly remanded the case to the district court for reconsideration in light of the applicable regulations.

The court of appeals erroneously suggested that petitioner must reconsider respondent's application

without regard for her hearing disability. Such a procedure is not required either by Section 504 or by the HEW regulations. A recipient of federal funds need not ignore an applicant's handicap; it must only make efforts, where feasible, to adjust its programs and provide the educational assistance necessary to permit qualified handicapped persons to participate. The Court should clarify this aspect of the court of appeals' instructions to the district court on remand.

III

A. This Court need not now decide whether Section 504 implicitly creates a private right of action to enforce the statutory prohibition against discrimination on the basis of handicap in federally funded programs. Petitioner is a public educational institution and therefore the alleged discrimination in this case occurred under color of state law. Accordingly, respondent may sue under 42 U.S.C. 1983 to enforce the provisions of Section 504, whether or not the latter statute itself gives rise to a private cause of action.

If the Court nonetheless decides to address the third question presented by petitioner, it should hold that Section 504 does impliedly authorize enforcement through private litigation. In this regard, we rely primarily on the arguments made in the briefs for the federal respondents in *Cannon* v. *University of Chicago*, No. 77-J26. The Senate report accompanying the 1974 amendments to the Rehabilitation Act expressly notes that Congress intended to "permit a judicial remedy through a private action" un-

der Section 504. Congressional action on the 1978 amendments to the Act offers additional support for this proposition. The amendments provide for an award of attorney's fees to private parties who prevail in enforcement suits under Title V of the Act. The Senate committee report on the amendments specifies Section 504 as one of the provisions that may be enforced through private litigation. The floor debates on the recent amendments, testimony at the 1977 House hearings on the implementation of Section 504, and the weight of judicial authority in cases arising under the Rehabilitation Act all serve to reinforce the conclusion that Section 504 does permit private suits by the victims of alleged discrimination against the handicapped.

B. Petitioners contend that respondent's suit is premature because she has not availed herself of the administrative grievance procedure set forth in the HEW regulations. This argument is insubstantial because no such procedure was available at the time respondent filed her complaint in the district court. Furthermore, neither the district court nor the court of appeals has ruled on the exhaustion question pressed by petitioner, and accordingly there is no decision on the matter now before this Court for review.

In any event, a person aggrieved by alleged discrimination in violation of Section 504 is not required to seek administrative relief as a precondition to private litigation. No exhaustion requirement of this kind exists, because individual victims of discrimination against the handicapped have no administrative remedies to exhaust. The complaint procedure established in the HEW regulations is an adjunct to the fund termination mechanism that Congress initially created for the enforcement of Title VI of the Civil Rights Act of 1964. The filing of an administrative complaint in accordance with the regulations initiates an investigation to which the complainant is not a party and which is not designed to grant him appropriate relief. Congress has not stated that resort to this procedure is a prerequisite for a private suit under Section 504, and no such requirement is fairly implied.

ARGUMENT

I. UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973, A HANDICAPPED PERSON MAY BE EXCLUDED FROM A FEDERALLY FUNDED POSTSECONDARY EDUCATION PROGRAM ONLY IF HE DOES NOT MEET ESSENTIAL REQUIREMENTS FOR ADMISSION TO OR PARTICIPATION IN THE PROGRAM AND COULD NOT DO SO EVEN AFTER FEASIBLE PROGRAM MODIFICATIONS AND EVEN WITH THE USE OF AVAILABLE EDUCATIONAL AIDS.

A. Introduction: The 1973 Act

This case presents a difficult question of statutory interpretation under the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* That statute, like earlier legislative efforts to aid the handicapped,[2] focuses pri-

[2] In 1920, Congress enacted the Smith-Fess Act, 41 Stat. 735, which established a program of federal grants-in-aid to state agencies providing training, counseling, and placement services for the physically handicapped. Since 1920 Congress

marily on the provision of federal financial assistance for vocational rehabilitation programs.[3] Congress

has repeatedly expanded the scope of this program with regard to both the kinds of services rendered and the kinds of handicaps treated. For example, in 1943, medical and surgical procedures were added to the rehabilitation program. See 57 Stat. 374. Eleven years later Congress authorized rehabilitation research and demonstration projects, substantially increased federal funding of state rehabilitation programs, and through matching grants encouraged state agencies to extend the coverage of their programs. 68 Stat. 652. Further significant expansions of the federal commitment to state rehabilitation programs occurred in 1965, 1967, and 1968. See 79 Stat. 286, 408; 79 Stat. 1282; 81 Stat. 250; 82 Stat. 297. A more detailed description of the development of federal legislation aiding the handicapped is set forth in S. Rep. No. 93-318, 93d Cong., 1st Sess. 8-11 (1973).

[3] Section 3 of the Rehabilitation Act of 1973 creates a Rehabilitation Services Administration to implement the various programs for the handicapped established by Congress. 29 U.S.C. 702. These programs include a large program of federal grants to state vocational rehabilitation agencies (Title I, 29 U.S.C. 720-750), a research and training program to provide more and better-trained rehabilitation personnel (Title II, 29 U.S.C. 760-764), and a number of other federal grant programs to assist the construction of rehabilitation facilities, to provide mortgage insurance for such facilities, and to finance certain special projects for agricultural workers and persons with certain specified kinds of handicaps (Title III, 29 U.S.C. 770-776). In particular, Congress established a National Center for Deaf-Blind Youths and Adults, 29 U.S.C. 774(b), 775, and authorized appropriations for special projects and demonstrations concerning rehabilitation of the deaf. See S. Rep. No. 93-318, 93d Cong., 1st Sess. 37-38, 39-40 (1973). Finally, Title IV of the Act instructs the Secretary of Health, Education, and Welfare to develop and publish standards for evaluating the effectiveness of state rehabilitation programs, to apply those standards in investigating such programs in cooperation with other federal agencies, and to render technical assistance to appropriate state agencies. 29 U.S.C. 780-782. Title IV also imposes on the Secretary a duty to render regular reports to Congress and the President concerning rehabilitation programs. See 29 U.S.C. 781(d), 784-787.

took an important additional step, however, in Title V of the 1973 Act, which includes a series of measures intended to promote the participation of handicapped persons in existing employment and educational programs not specially designed for the handicapped.[4] The correct construction of one of these provisions, Section 504 of the Act, 29 U.S.C. 794, is the central concern of this case.

Section 504 prohibits discrimination against "otherwise qualified handicapped individuals" in any program or activity receiving federal financial assistance. The statute provides in pertinent part:

> No otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from participation in, be denied the

[4] Section 501(b) of the Act directs all federal agencies to develop "an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals * * *" 29 U.S.C. 791(b). Section 501(c) encourages state agencies to do likewise. 29 U.S.C. 791(c). Similarly, Section 503(a) obligates federal contractors to "take affirmative action to employ and advance in employment qualified handicapped individuals." 29 U.S.C. 793(a). Section 501(a) establishes an Interagency Committee on Handicapped Employees to review the hiring, placement, and advancement of handicapped persons by federal agencies (29 U.S.C. 791(a)), and Section 502 creates an Architectural and Transportation Barriers Compliance Board to promote the elimination of physical barriers that restrict the mobility of and opportunities available to handicapped persons (29 U.S.C. 792).

> benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The language of Section 504 is thus similar to that contained in other statutory provisions prohibiting different kinds of discrimination in federally funded programs. See, *e.g.*, Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d (no discrimination on the basis of race, color, or national origin); Section 901 of the Education Amendments of 1972, 20 U.S.C. 1681 (no discrimination on the basis of sex in many federally funded education programs). Despite this apparent similarity, however, Section 504 poses unique problems of interpretation and application, because the basis for discrimination that the statute makes impermissible is, at least in some circumstances, a physical characteristic that limits a person's ability to participate in existing programs.

Personal characteristics such as race and sex ordinarily do not affect a person's ability to perform certain tasks or to complete certain training. Congress' decision to prohibit racial, ethnic, and sexual discrimination in federally funded programs was intended to guarantee that no person, and in particular no woman and no member of a racial or ethnic minority, would be denied the benefits of federal funds on the basis of physical factors unrelated to that person's ability to participate in a given program.

The motivation for Section 504 was a bit different. Congress was not so much concerned with arbitrary discrimination as it was with years of inattention to

the needs of the handicapped. The problem was not so much that handicapped persons were excluded from programs in which they could easily participate, but that educational curricula were developed and physical facilities designed and constructed without any effort to make them accessible to the handicapped. When Congress legislated to prevent the denial of benefits to "otherwise qualified handicapped individual[s] * * * solely by reason of [their] handicap," the discrimination that Congress sought to eliminate comprised not only the irrational exclusion of handicapped persons merely because of their physical disability, but also the failure by recipients of federal funds to reevaluate their existing educational or employment requirements and to make reasonable modifications to permit participation by the handicapped.

Of course, Congress recognized that certain handicapped persons may be unable successfully to pursue a given occupation or course of study; a blind person cannot drive a bus and a person confined to a wheelchair cannot participate in a training program for Olympic gymnasts. The critical consideration is whether a particular physical ability is a real prerequisite for effective participation in a given program or activity or whether that ability is only said to be necessary because a recipient of federal funds has not given adequate consideration to the ways in which stated requirements may be modified in order to permit participation by the handicapped.

Accordingly, it is a mistake to treat the problem of interpreting Section 504 as a choice between the "in

spite of" standard adopted by the district court and the "without regard to" standard endorsed by the court of appeals in the present case. On the one hand, Congress meant to do more than simply prohibit discrimination against handicapped persons who are fully able to participate in existing programs in spite of their handicaps, *i.e.*, without modification of program requirements or physical facilities and without special assistance. Congress was concerned in 1973, and especially when it amended the Rehabilitation Act in 1974 and 1978, that too frequently handicapped persons are excluded from participation in federally funded programs in which they could readily take part if more care and planning by fund recipients were directed toward that end. On the other hand, Congress did not mean to say that all employment and educational decisions in federally funded programs must be made without regard for a participant's or prospective participant's handicap. Persons whose physical disability prevents them from performing tasks essential to effective participation need not be evaluated wholly apart from their physical limitations.

As initially passed, Section 504 was a single sentence, unaccompanied by any explanation concerning the scope of its coverage or the method of its enforcement. The substantial difficulties that arise in interpreting and applying Section 504 are attributable to Congress' failure to specify what is meant by discrimination against an "otherwise qualified handicapped individual * * * solely by reason of his handi-

cap." In addition, the administrative fund termination mechanism provided in Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 did not appear in Title V of the Rehabilitation Act. Congress simply enacted a provision prohibiting discrimination against the handicapped in federally funded programs; it did not describe the kinds of practices it wished to ban or the way in which victims of illegal discrimination could obtain relief.[5]

---

[5] The Senate Report accompanying the 1973 Act merely noted that Section 504 "proclaim[s] a policy of nondiscrimination against otherwise qualified handicapped individuals with respect to participation in or access to any program which is in receipt of Federal financial assistance." S. Rep. No. 93-318, 93d Cong., 1st Sess. 50 (1973). In another report issued the same day, the Senate Committee on Labor and Public Welfare recommended that a White House Conference on the Handicapped be called. S. Rep. No. 93-319, 93d Cong., 1st Sess. (1973). Describing the problems of the handicapped in general terms, this report stated (*id.* at 2-3) that handicapped persons are

> all too often excluded from schools and educational programs, barred from employment or * * * underemployed because of archaic attitudes toward the handicapped, denied access to transportation, buildings and housing because of architectural barriers and lack of planning, and * * * discriminated against by our public laws. * * * Too often our programing for, and thinking about, the handicapped fails because of lack of knowledge. Too often we find that we automatically make the assumption that nothing can be done.

See also *Rehabilitation Act of 1972: Hearings on H.R. 8395 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 537, 1346, 1348 (1972) (testimony to the effect that employers

B. The 1974 Amendments

The first clarification of legislative intent came one year later, when the 93d Congress in its 2d Session tried to eliminate some of the confusion that had been created in the 1973 version of the Rehabilitation Act. The Act had originally defined the term "handicapped individual" to include (87 Stat. 361)

> any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and III of this Act.

This definition had the effect of restricting the compass of Section 504 to those handicapped persons in need of and able to benefit from vocational rehabilitation services. The 1974 amendments (29 U.S.C. 706(6)) abolished this limitation and provided that, for the purposes of Titles IV and V of the Act, a "handicapped individual" is any person who

> (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.

---

often impose excessively stringent physical requirements for prospective employees and thereby exclude handicapped persons, including deaf persons, who are in fact able to perform necessary job functions).

This revised definition was intended to make clear that Section 504 protects all handicapped persons and all persons regarded as handicapped, irrespective of their employment prospects or ability to benefit from rehabilitation services.[6]

The committee report accompanying the 1974 amendments makes two important points concerning Section 504. First, the report establishes that, in Congress' view, the statute imposes on recipients of federal funds an obligation to undertake affirmative efforts to involve handicapped persons in programs and activities supported by federal financial aid. Just as Section 503 of the Act, 29 U.S.C. 793, requires federal contractors to "take affirmative action to employ and advance in employment qualified handicapped individuals * * *," Section 504 "is intended to include a requirement of affirmative action as well as a prohibition against discrimination."

---

[6] The pertinent portion of the Senate report accompanying the 1974 amendments explained that (S. Rep. No. 93-1297, 93d Cong., 2d Sess. 37-38 (1974)):

> a test of discrimination against a handicapped individual under section 504 should not be couched either in terms of whether such individual's disability is a handicap to employment, or whether such individual can reasonably be expected to benefit, in terms of employment, from vocational rehabilitation services. Such a test is irrelevant to the many forms of potential discrimination covered by section 504.
>
> Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs.

S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39 (1974). This legislative history is highly persuasive with respect to the meaning of Section 504 as originally enacted. The committee report accompanying the 1974 amendments comes from the very same committee and the very same Congress that considered and passed the 1973 Act a year earlier. The committee's comment therefore shows that the Congress that adopted Section 504 did not intend that provision merely to prohibit discrimination against persons who, in spite of their handicaps, are capable of participating in existing programs; rather, Congress contemplated that recipients of federal funds would be required to take affirmative steps to ensure that the benefits of federal funding are available to handicapped persons who, with reasonable accommodation and assistance, can meet essential program requirements.[7]

[7] In June 1974, acting in accordance with Exec. Order No. 11758, 39 Fed. Reg. 2075 (1974), the Department of Labor issued regulations implementing the affirmative action requirements for government contractors contained in Section 503 of the Rehabilitation Act. 39 Fed. Reg. 20566 (1974). (The regulations are now codified at 41 C.F.R. Part 60-741.) In explaining these regulations to the Senate Committee considering the 1974 amendments to the act, the Secretary of Labor wrote (S. Rep. No. 93-1297, *supra*, at 106):

> It should be noted that the Regulations have broadened the minimum scope of affirmative action by incorporating the accommodation obligation as one aspect of that action. The accommodation obligation may involve providing access to the workplace, the job site, or to supplies. It may involve the redesign or restructuring of jobs or the modification or acquisition of equipment or special devices. The requirements of a particular business may negate job restructuring, as may the financial costs involved, or seniority and tenure arrangements may require protracted negotiations and compromises to avoid personnel problems. In each case, however, the actual facts and circumstances must be considered from the standpoint of what is reasonable.

The second significant aspect of the committee report on the 1974 amendments is its plain declaration

In addition, several years before Congress considered the Rehabilitation Act and the 1974 amendments, HEW had issued guidelines governing the enforcement of Title VI of the Civil Rights Act of 1964. 35 Fed. Reg. 11595 (1970). Those guidelines required school districts receiving federal financial assistance to modify their academic programs to ensure that "national origin-minority group children" were not excluded from effective participation in educational programs because of an "inability to speak and understand the English language." A failure to make such modifications where necessary, the guidelines stated, is discrimination on the basis of national origin, in violation of Section 601 of the Act. HEW took this position even though the language of Section 601 does not explicitly refer to the need for affirmative measures to avoid discrimination. This administrative construction of Section 601, requiring affirmative steps to accommodate persons of limited language ability, was sustained by this Court in *Lau* v. *Nichols*, 414 U.S. 563 (1974), a case decided only ten months before enactment of the 1974 amendments to the Rehabilitation Act.

When this background is considered in conjunction with the Senate Committee's express statement that the antidiscrimination provision in Section 504 "is intended to include a requirement of affirmative action," the conclusion that Congress envisioned the modification of academic programs and physical facilities to accommodate the handicapped is inescapable. The 1974 committee report shows (S. Rep. No. 93-1297, *supra*, at 39-40) that Congress was mindful of enforcement efforts under Section 601 of the Civil Rights Act and Section 503 of the Rehabilitation Act and expected enforcement of Section 504 to follow the pattern of requiring recipients of federal funds to undertake affirmative measures in aid of persons protected by the statute.

that Congress expected HEW and other federal agencies to promulgate regulations governing the implementation and enforcement of Section 504. The report states (S. Rep. No. 93-1297, *supra*, at 39-40):

> Section 504 * * * constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended.
>
> The language of section 504, in follow[i]ng [Section 601 of the Civil Rights Act and Section 901 of the Education Amendments], further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. * * * This approach to implementation of section 504, which closely follows the models of the above-cited anti-discrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action.

> It is intended that sections 503 and 504 be administered in such a manner that a consistent, uniform, and effective Federal approach to discrimination against handicapped persons would result. Thus, Federal agencies and departments should cooperate in developing standards and policies so that there is a uniform, consistent Federal approach to these sections. The Secretary of the Department of Health, Education, and Welfare, because of that Department's experience in dealing with handicapped persons and with the elimination of discrimination in other areas, should assume responsibility for coordinating the section 504 enforcement effort and for establishing a coordinating mechanism with the Secretary of the Department of Labor to ensure a consistent approach to the implementation of sections 503 and 504. The conferees fully expect that H.E.W.'s section 504 regulations should be completed by the close of this year. Delay beyond this point would be most unfortunate since the Act (P.L. 93-112) was enacted over one year ago—September 26, 1973.

The regulations involved in the present case are thus not the product of an executive agency's independent impulse, but rather are a direct response to the expressed will of Congress. Unfortunately, however, the regulations were not promulgated in accordance with the timetable set by the Senate Committee on Labor and Public Welfare. Although the Committee's report was issued and the 1974 amendments passed on November 26, 1974, HEW's final regulations were

not promulgated until April 28, 1977,[8] one year after President Ford formally ordered the Secretary of HEW to perform the tasks described earlier in the committee report.[9] See Exec. Order No. 11914, 41 Fed. Reg. 17871 (1976).

C. The HEW Regulations

The regulations begin with a series of definitions. After repeating the statutory definition of "handicapped persons" within the meaning of Title V (compare 29 U.S.C. 706(6) with 45 C.F.R. 84.3(j)(1)), the regulations proceed to define and explain some of the phrases used in the statutory provision, *e.g.*, "physical or mental impairment," "major life activities," "has a record of such an impairment," and "is regarded as having such an impairment." See 45 C.F.R. 84.3(j)(2)(i)-(iv). The regulations then state what is meant by the term "qualified handicapped person." In the context of postsecondary and vocational education services, a qualified handicapped person is one "who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity." 45

[8] In January 1978, HEW promulgated an additional set of regulations governing the implementation and enforcement of Section 504 by other federal agencies. See 45 C.F.R. Part 85. The substantive provisions of these regulations parallel those set forth in the 1977 regulations. See pages 38-44 *infra*.

[9] In July 1976, in a suit brought by a handicapped rights organization, a federal district court ordered the Secretary of HEW to issue final regulations under Section 504 without "further unreasonable delays." *Cherry* v. *Mathews*, 419 F. Supp. 922, 924 (D.D.C. 1976).

C.F.R. 84.3(k)(3). The comments accompanying this regulation state that HEW defines "technical standards" as "all nonacademic admissions criteria that are essential to participation in the program in question." 45 C.F.R. Part 84, Appendix A at 405.

Following the definitions in Section 84.3, the regulations elaborate in general terms on the antidiscrimination provision in Section 504 of the Rehabilitation Act. 45 C.F.R. 84.4(a) restates the statutory prohibition in nearly identical language and Section 84.4(b)(1) catalogues a number of illegal discriminatory actions. Section 84.4(b)(2) stresses that the Rehabilitation Act provision is concerned with equal opportunity, not equal results or achievement. A recipient of federal funds is not required to ensure that a handicapped person reaches the same level of proficiency as a nonhandicapped person in the same program; only an opportunity to do so must be provided. Finally, Section 84.10, the last section in the regulations' introductory subpart, states that the obligation of federal fund recipients not to discriminate in violation of Section 504

> is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.[10]

[10] This language is found in Section 84.10(a). Section 84.10(b) provides that the obligation not to discriminate "is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons."

The comments to Section 84.10 state that the provision "applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap." 45 C.F.R. Part 84, Appendix A at 408.

Subpart E of the regulations, 45 C.F.R. 84.41-84.47, contains provisions specifically applicable to postsecondary education. Several of these are especially relevant to the present case. First, Section 84.42(b)(2) states that in administering its admission policies, a recipient of federal funds may not use any test or criterion that has a disproportionate effect on the handicapped, unless the test "has been validated as a predictor of success in the education program or activity in question," and the Director of HEW's Office of Civil Rights has not shown that alternate tests or criteria, having a less adverse effect on the handicapped, are available. In particular, Section 84.42(b)(4) provides that, except in connection with affirmative or remedial action programs, a recipient may not inquire, as part of its admissions procedure, whether an applicant is a handicapped person.

If the proper application of HEW's regulations to the present case is to be understood, it is critical that Sections 84.42(b)(2) and 84.42(b)(4) be read in conjunction with the definition of a "qualified handicapped person" in Section 84.3(k)(3). In order to satisfy the latter definition, an applicant must demonstrate that he meets "all nonacademic admissions criteria that are essential to participation in the program in question." 45 C.F.R. Part 84, Appendix

A at 405. Thus, if the ability to perform a particular physical task or function is an essential requirement for participation in a particular program, the recipient of funds may inquire whether an applicant can fulfill that requirement. Such an inquiry may have a disproportionate effect on the handicapped, but if the task is indeed essential to success in the program, then the validation requirement of Section 84.42(b)(2) will be satisfied. Moreover, if applications for admission concentrate on the applicant's ability to perform essential functions, there will be no need to ask the more general questions that would violate Section 84.42(b)(4), *e.g.*, whether the applicant is a handicapped person or whether his sensory, manual, and locomotive abilities are normal. The purpose of the regulations is to preclude this kind of routine question concerning an applicant's handicapped status, and that purpose is not offended by more carefully drawn inquiries that focus on the ability to perform essential tasks.

The final provision in the HEW regulations that deserves attention here is 45 C.F.R. 84.44, dealing with "academic adjustments" to assist handicapped students. Section 84.44(a) states that fund recipients must modify their academic requirements "to ensure that such requirements do not discriminate, or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student." In the very next sentence, however, the regulation reiterates the point that can also be derived from Section 84.3(k)(3)'s definition of "qualified handicapped person" and the accompanying comment (see pages 38-39, *supra*): Academic require-

ments need not be modified if they are essential to a particular program of instruction or to a directly related licensing requirement.[11] Thus, a handicapped person is not qualified under HEW's regulations unless he can meet all academic and nonacademic admissions criteria that are essential to the program in question. And, no modification or accommodation need be made where particular academic requirements are shown to be essential to the program of instruction or to a directly related licensing requirement.[12]

[11] The second sentence of Section 84.44(a) states:

> Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section.

[12] Section 84.10(a) of the regulations (page 39, *supra*) provides that recipients may not justify their discrimination by reference to state or local law that imposes prohibitions on the basis of handicap. But, as Section 84.44(a) makes clear, the regulations do not preclude recipients from tailoring their academic requirements to take account of legitimate licensing standards directly related to a particular course of study. For example, Section 84.44(a) would permit a school for drivers' education instructors to design its curriculum in accordance with a local licensing requirement that the training of such instructors include at least 30 hours of supervised over-the-road operation of a motor vehicle. A course of study formulated to prepare the school's graduates to meet such a licensing requirement would inevitably exclude blind students, because the operation of a motor vehicle would be an essential part of the training program that could not be modified and that a blind person could not complete even with auxiliary educational aids. (Even without the licensing requirement, of course, the school almost certainly would decide that some period of actual driving under supervision is an indispensable part of the education program in question.)

The purpose of Section 84.44(a) is simply to guarantee that handicapped persons are not excluded from participation in federally funded programs because of a refusal to make reasonable adjustments in nonessential aspects of an academic curriculum. The examples provided in the regulation are instructive.

> Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.[13]

Section 84.44(d) deals with "auxiliary aids." The regulation provides that recipients of funds must take necessary steps to ensure that handicapped students are not excluded from education programs "because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking

[13] The comments accompanying Section 84.44(a) elaborate further (45 C.F.R. Part 84, Appendix at 417):

> This requirement * * * does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the needs of individual handicapped students. For example, an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. It should be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.

skills." Such aids may include "taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments * * *." [14] Of course, in given situations, such aids may be inadequate to enable a handicapped person to participate effectively in an essential part of a course of study that cannot be modified to offer greater access. In such a situation, neither Section 84.44(d) nor any other provision in HEW's regulations prevents a recipient from denying the handicapped person admission to the program in question.

D. The 1978 Amendments

Petitioner does not contend that the regulations outlined above are inconsistent with Section 504 (see Pet. Br. 30-41, 47-56). Rather, petitioner argues that

---

[14] To avoid misunderstanding, Section 84.44(d)(2) explicitly states that "[r]ecipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature."

The comments to Section 84.44(d) explain that recipients can usually meet the obligation to provide auxiliary aids "by assisting students in using existing resources * * * such as state vocational rehabilitation agencies and private charitable organizations." 45 C.F.R. Part 84, Appendix A at 417. HEW anticipates that "the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities." *Ibid.*; see note 19, *infra* for a description of the additional federal grants provided in the 1978 amendments to the Rehabilitation Act in order to support the development and increased availability of auxiliary aids for the deaf; see also Section 101(a) of the amendments, 92 Stat. 2955, authorizing an increased appropriation of $48,000,000 for Title I's basic vocational grant program, thus raising the authorization for the fiscal year ending September 30, 1979, to $808,000,000.

the district court's decision, although rendered before issuance of the HEW regulations, adheres fully to the agency's interpretation of Section 504 and that therefore the remand ordered by the court of appeals is unnecessary. We respond to that contention in the following section (see pages 55-67, *infra*). First, however, we answer the argument of 32 states as amici curiae in support of petitioner to the effect that the regulations do not comport with the congressional intent underlying Section 504 (see Br. for the Commonwealth of Massachusetts, et al. 13-22).

As we have already emphasized (see pages 36-37, *supra*), the committee report accompanying the 1974 amendments to the Rehabilitation Act leaves little doubt that Congress wanted and expected the Secretary of HEW to issue regulations implementing Section 504 and providing guidance for recipients' affirmative efforts on behalf of the handicapped. See also H.R. Rep. No. 94-721, 94th Cong., 1st Sess. 4 (1975) (report accompanying fund authorizations in Rehabilitation Act Extension of 1976, Pub. L. No. 94-230, 90 Stat. 211). Any lingering uncertainty over whether Congress approves the requirement that recipients of federal funds must modify their programs where feasible to permit participation by the handicapped was eliminated by the passage and legislative history of the 1978 amendments to the Rehabilitation Act, 92 Stat. 2955.

In January 1977, before signing the regulations implementing Section 504, Secretary Mathews sub-

mitted them to Congress for its review. In his cover letter, the Secretary stated:

> I believe that the Executive and Legislative branches should work together so that it cannot be said that the Executive Branch has pursued policy beyond or in contradiction to what Congress authorized. A way to prevent any such confusion is for the Department, where the intent of the statute is unclear, to lay its interpretation of the statute before the Congress so that it can provide whatever clarification is appropriate.

Implemention of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. 73 (1977) (hereinafter cited as *Implementation Hearings*). Likewise, in April 1977, when Secretary Califano issued the long-awaited regulations, he transmitted a copy to each Member of Congress and attached a cover letter stating (*id.* at 76):

> This regulation is strong. In many cases it calls for dramatic changes in the actions and attitudes of institutions and individuals who are recipients of HEW funds * * *.
>
> In light of the limited legislative history, I think it especially important that Congress evaluate the regulation, and the implementation process, to ensure that they conform to the will of Congress.

Congress entered no objection in response to the submission by either Secretary.[15]

On the contrary, a variety of legislative materials demonstrates that the 95th Congress knew of the administrative construction of Section 504, assumed that compliance with Section 504 would entail an indeterminate, although probably substantial, expense for structural and programmatic modifications, and perceived no inconsistency between the newly promulgated regulations and the intent of the Congress that initially passed the Rehabilitation Act.

In September 1977, the Subcommittee on Select Education of the House Committee on Education and Labor held hearings concerning the implementation of Section 504. HEW's regulations had been issued only a few months before, and the testimony at the hearings focused on the obligation of federal fund recipients to undertake affirmative efforts to help handicapped persons participate in funded programs and activities.[16] See, *e.g.*, *Implementation Hearings*,

---

[15] In the 1978 amendments, Congress added a statutory requirement that regulations under Section 504 be submitted to the appropriate authorizing committee in each House at least 30 days before they are to become effective. See Section 119(2) of the 1978 amendments, 92 Stat. 2982. See also H.R. Conf. Rep. No. 95-1780, 95th Cong., 2d Sess. 92-93 (1978).

[16] At hearings held two months earlier in the Senate on a bill to extend the effectiveness of certain programs established in the Rehabilitation Act, Senator Dole referred favorably to the newly promulgated regulations under Section 504. See *Rehabilitation Extension Amendments of 1977: Hearings on S. 1712 and S. 1596 Before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 726-727 (1977).

supra, at 2-3, 11-15, 31-42, 43-45, 182-183, 199-216, 246-250, 253-257, 272-275, 358-360. No one suggested that Congress did not intend to impose such an obligation when it enacted Section 504.[17] Indeed, Representative Brademas, Chairman of the Subcommittee, began the hearings by declaring (*id.* at 1; see also *id.* at 289):

> With the publication of the regulations for section 504, disabled people can look forward to their rightful opportunity for full participation in our society.
>
> Central to the implementation of these regulations must be the realization that what handicapped people want is access to programs. Inevitably, enforcement of and compliance with Section 504 will cause some readjustment problems. Costs may be incurred and modifications might be required.

The ensuing testimony concentrated primarily on the likely costs of the modifications required by Section 504 and its accompanying regulations and on the federal government's responsibility *vel non* to bear some or all of those costs. There was no dispute over whether Section 504 requires *some* modifications. That the statute does have such an effect was simply assumed by committee members and witnesses alike.

---

[17] In his prepared statement, David Tatel, Director of HEW's Office for Civil Rights, summarized the content of the new regulations and specifically mentioned that the regulations require postsecondary educational institutions to make "reasonable modifications in academic requirements, where necessary, to insure full educational opportunity for handicapped students." *Id.* at 296.

The floor debates in the House and Senate on the Rehabilitation Amendments of 1978 likewise manifested general acceptance of HEW's regulations and the obligation of fund recipients to accommodate handicapped persons where feasible by modifying program requirements and physical facilities. For example, Representative Jeffords, a member of the House Subcommittee on Select Education and a House conferee on the 1978 legislation, stated (124 Cong. Rec. H13473 (daily ed. Oct. 14, 1978)):

> As a result of section 504 it has become clear to many that 504 means more than just removing architectural barriers for the physically handicapped. While this is certainly a priority goal, there are many other types of disabilities to which 504 applies and to which attention must be paid. People who are deaf face communication barriers which are just as great as the architectural barriers faced by those in wheelchairs. People who are blind face problems not encountered by either group and so some of the provisions that I helped develop were addressed specifically to these groups. One of the biggest problems facing the deaf throughout the country is the lack of interpreters to allow them to function within a hearing society. Not only are there not enough interpreters, there are specifically not enough trained interpreters. The provision in this conference report will establish 12 interpreter-training centers and interpreter pools within each State and help to alleviate these problems and make section 504's nondiscrimination policies meaningful as well as applicable to them.

See also *id.* at H13474-H13475 (remarks of Rep. Sarasin); *id.* at S18997 (remarks of Sen. Randolph); 124 Cong. Rec. H3974 (daily ed. May 16, 1978) (remarks of Rep. Dodd); *id.* at H3969 (remarks of Rep. Jeffords); 124 Cong. Rec. S15548 (daily ed. Sept. 20, 1978) (remarks of Sen. Randolph) ("if reasonable accommodations can be made to an individual's handicap, the goal of a productive life can be achieved by handicapped Americans").

The committee reports as well support the proposition that Congress viewed the HEW regulations as an appropriate interpretation and application of Section 504. The report of the Senate Committee on Human Resources is particularly instructive. The Committee noted that "a great deal of progress has been made in the legal rights area with the enactment of section 504 of the Rehabilitation Act of 1973 and other laws affecting the handicapped regarding affirmative action in employment and accessibility to programs and activities and buildings." S. Rep. No. 95-890, 95th Cong., 2d Sess. 36 (1978). See also *id.* at 18, 19, 55 (referring without objection to the enforcement of the regulations promulgated under Section 504); H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. 34 (1978) (referring to the September 1977 implementation hearings and the "widely varying estimates of the costs of converting facilities to comply with the regulations implementing section 504").

In a discussion of the 1978 amendment expanding the responsibilities of the Architectural and Transportation Barriers Compliance Board created by Section 502 of the Act, the Senate Committee provided further evidence of its approval of the HEW regulations and its understanding that Section 504 was intended to require affirmative efforts to modify programs and physical structures to facilitate participation by handicapped persons in federally funded activities. Observing that the amendments authorize the Board to offer technical assistance to any public or private entity interested in removing architectural and transportation barriers which impede the mobility of the handicapped (see 92 Stat. 2981), the Committee stressed (S. Rep. No. 95-890, *supra*, at 17) that the Board is authorized to render aid only in connection with physical barriers, and not with respect to nonstructural measures that may be employed to improve program accessibility under Section 504 and its accompanying regulations.[18] The plain

[18] The Committee stated:

> An important function in achieving the desired goals of section 504 of the Rehabilitation Act of 1973 is the creation of a barrier free environment for the handicapped members of our society. It should be noted that the committee, in authorizing this technical assistance capability for the Board, realizes that the Board's expertise lies only in the area of physical barriers to accessibility and it is this expertise that the committee wishes provided under this authority. It further noted that nothing in this section should be construed to mean that the Board can develop and provide technical assistance with regard to nonstructural methods of removing barriers which limit a handicapped person's access to programs. Nonstructural methods of removing or eliminating barriers

implication of the Committee's remarks is that the HEW regulations accord with the will of Congress by requiring a variety of affirmative steps to enable handicapped persons to participate in federally funded programs.

Just as the legislative background of the 1978 amendments evidences Congress' acceptance of the HEW regulations, the amendments themselves bear witness to the congressional conviction that recipients of federal funds must make needed programmatic and structural modifications in order to avoid discriminating against the handicapped in violation of Section 504. Section 120 of the amendments, 92 Stat. 2983-2984, added a new Section 507 to the Act (to be codified at 29 U.S.C. 794c), creating an Interagency Coordinating Council to promote the efficient "implementation and enforcement of the provisions of [Title V], *and the regulations prescribed thereunder*" (emphasis added). And, significantly, Section 115(a) of the amendments, 92 Stat. 2971, added a new Section 305 to the Act (to be codified at 29 U.S.C. 775), authorizing grants to states for the establishment and operation of comprehensive rehabilitation centers that "shall provide * * * to local governmental units and other public and private non-

include the reassignment of classes or other services to accessible buildings; assignment of aides; home visits; delivery of health, welfare, and other such services at alternate accessible sites; and other such methods short of physical alteration that are permitted in order to achieve program accessibility under section 504 regulations.

profit entities located in the area such information and technical assistance (including support personnel such as interpreters for the deaf) as may be necessary to assist those entities in complying with this Act, particularly the requirements of section 504." [19] Thus,

[19] In keeping with the clear indication in the new Section 305(a)(2) that compliance with Section 504 in some circumstances may require the provision of auxiliary aids for the handicapped and, in particular, interpreter services for the deaf, Congress took a number of steps in the 1978 amendments to improve the availability of such services and to provide additional financial support for research and development activities in connection with other auxiliary aids for the deaf and other handicapped persons. For example, Section 114(3) of the amendments, 92 Stat. 2970-2971, adds a new Section 304(d) to the Act (to be codified at 29 U.S.C. 774(d)), authorizing grants to assist public or private nonprofit organizations in establishing or operating 12 programs "[f]or the purpose of training a sufficient number of interpreters to meet the communications needs of deaf individuals." In addition, Section 116(2) of the amendments, 92 Stat. 2975-2976, adds new Sections 314 and 315 to the Act (to be codified at 29 U.S.C. 777d and 777e), authorizing the Commissioner of the Rehabilitation Services Administration to make grants for the purpose of "expand[ing] the quality and scope of reading services available to blind persons" and "establish[ing] within each State a program of interpreter services (including interpreter referral services) which shall be made available to deaf individuals and to any public agency or private nonprofit organization involved in the delivery of assistance or services to deaf individuals." See also the new Section 103(b)(4) of the Act, 92 Stat. 2960 (providing that group vocational rehabilitation services may include "providing recorded material for the blind and captioned films or video cassettes for the deaf"); and the new Section 204(b)(10) of the Act, 92 Stat. 2967 (authorizing the Secretary of HEW to make grants for the purpose of conducting "a model research and demonstration project designed to assess the feasi-

the very language of the amended Act supports the conclusion that compliance with Section 504 requires program modifications to accommodate the handicapped and the provision of available educational aids to assist handicapped persons in participating in federally funded activities. The 1978 amendments and their legislative history are invaluable aids in the interpretation of Section 504, and it is especially noteworthy that nothing in the amendments or related materials reflects any congressional dissatisfaction with HEW's administrative construction of the anti-discrimination provision—a construction of which Congress was well informed. As this Court has said in a different statutory context,

---

bility of establishing a center for producing and distributing to deaf individuals captioned video cassettes providing a broad range of educational, cultural, scientific, and vocational programming.")

The legislative history of the 1978 amendments contains voluminous materials demonstrating Congress' awareness of and special concern for the needs of the deaf and persons with impaired hearing. See, in addition to the remarks of Representative Jeffords and Senator Randolph cited above (pages 49-50, *supra*), H.R. Rep. No. 95-1149, *supra*, at 12, 16, 17, 36, 38; S. Rep. No. 95-890, *supra*, 4, 21, 41-42, 45, 70-71; H.R. Conf. Rep. No. 95-1780, 95th Cong., 2d Sess. 76, 78, 81-82 (1978); *Implementation Hearings*, *supra*, at 34, 57, 59, 206, 244, 247, 278-279, 370-371, 447-455, 466-467; *Oversight Hearings on the Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 95th Cong., 2d Sess. 586-589, 594-595, 598-599 (1978); *Rehabilitation Amendments of 1978: Hearings on S. 2600 Before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources*, 95th Cong., 2d Sess. 222-223, 506-554 (1978).

> [s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. Here the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation.

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 380-382 (1969) (footnotes omitted).

II. THE COURT OF APPEALS CORRECTLY REMANDED THIS CASE TO THE DISTRICT COURT FOR RECONSIDERATION IN LIGHT OF THE REGULATIONS IMPLEMENTING SECTION 504.

No court has yet considered whether respondent can safely perform in petitioner's nursing program if feasible adjustments are made in the clinical portion of that program to accommodate her handicap. This case was tried and the district court's decision rendered before HEW issued its regulations for the implementation of Section 504. As a consequence, neither the district court nor the parties focused on the questions that must be addressed in order to resolve respondent's claims.

The district court held that Section 504 protects only those handicapped persons who are "able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are

suitable and available" (Pet. App. 20a). Under this construction, Section 504 prohibits discrimination against only those handicapped persons who can fully participate in a federally funded activity, given existing program requirements, training methods and physical facilities. The district court therefore was unimpressed by testimony from the former director of petitioner's nursing program (A. 53a) to the effect that, with appropriate supervision, respondent may be able to participate successfully in the clinical phases of the training curriculum. The court simply did not acknowledge that a recipient of federal funds may be required under Section 504 to adjust its requirements and to provide training aids and facilities not previously available in its program in order to afford handicapped persons an opportunity to participate.

The district court's narrow construction of Section 504 is inconsistent with the statute's legislative history and with the implementing regulations issued by HEW. The court of appeals correctly decided that the district court's application of Section 504 was erroneous and that under the statute petitioner might be required to modify its nursing program to accommodate respondent and other handicapped persons (Pet. App. 6a, 8a-10a).

The court of appeals also stated (Pet. App. 5a), however, that petitioner "must reconsider [respondent's] application for admission to the nursing program without regard to her hearing disability." This statement may mean that, in the court of appeals'

view, Section 504 precludes petitioner from considering the nature and extent of respondent's handicap in determining whether she is qualified to participate in the nursing program. If this reading of the opinion is accurate and the court of appeals believes that respondent's handicap must be treated as wholly irrelevant to petitioner's admission decision,[20] then

---

[20] It is not clear that the panel's opinion must be so interpreted. The opinion could be construed to require petitioner first to determine whether respondent meets those admission standards unrelated to physical ability and then, if the decision is affirmative, to consider whether the program of instruction in nursing can be modified to permit respondent to participate safely. Such an approach would satisfy petitioner's obligations under the applicable regulations (see 45 C.F.R. 84.42(b)(4) and 84.44) and would ensure that evaluation of a handicapped applicant's academic qualifications is not subtly influenced by the fact that program adjustments might later be required. Of course, if program modifications and auxiliary aids prove insufficient to permit participation by a handicapped person whose non-physical abilities would qualify him for admission, the person need not be enrolled.

If this is the intended meaning of the court of appeals' opinion, then it is consistent with Section 504 and the governing regulations. The opinion still ignores, however, the possibility that a recipient of federal funds may wish to include as a "technical standard" for admission to a postsecondary education program (see 45 C.F.R. 84.3(k)(3) and 84.42(b)(2)) a requirement that an applicant be able to perform some physical task or function essential to participation in the program. If this is the way in which the recipient wishes to proceed and if the recipient demonstrates that the criterion is a valid predictor of success in the program (and the Director of HEW's Office for Civil Rights does not identify any alternate test with a less disproportionate adverse effect on the handicapped), then nothing in the Section 504 regulations prohibits the recipient from conducting its admissions

the ruling below misconstrues the requirements of Section 504 and the accompanying regulations; and this Court should clarify the court of appeals' instructions to the district court.

The critical inquiry is whether respondent's handicap prevents her from performing tasks essential to the nursing program, even after she has been provided with available auxiliary aids and feasible program modifications have been made. Section 504 does not require petitioner to ignore respondent's hearing problem; it does require petitioner to try to find a way for qualified handicapped persons to participate in its federally funded programs.

The record in this case does not establish whether the clinical portion of petitioner's Associate Degree program can be modified in order to permit respondent to participate in the essential aspects of nurses'

---

program in this manner. The court of appeals' opinion is too restrictive to the extent it indicates that a recipient may not proceed in the way described here but may make admissions decisions only in the way described in the first paragraph of this note.

Whatever the deficiencies of the court of appeals' opinion, though, petitioner errs in asserting (Pet. Br. 41) that respondent "has been judicially declared 'otherwise qualified' to be admitted" to the Associate Degree Nursing Program. The court of appeals carefully noted that it was not expressing any opinion on respondent's academic and nonacademic qualifications (see Pet. App. 5a & n.5) or on whether petitioner's program can be modified to accommodate a student with a hearing impairment like respondent's (see Pet. App. 8a & n.8). The question whether respondent is qualified to participate in the program if feasible adjustments are made and auxiliary aids are provided is precisely the question that the district court did not address initially and that must be answered on remand.

training. Petitioner characterizes respondent as a "seriously deaf person" (Pet. Br. 41), but the report of the audiologist at the Duke University Medical Center states that, with a proper hearing aid, respondent's hearing improves to a level at the outer limits of normal hearing (A. 125a, 127a-128a). The district court's finding of fact (Pet. App. 15a) follows the doctor's report. Because this case was tried before the issuance of HEW's regulations, neither party developed evidence concerning the possibility that respondent and other persons with similar hearing difficulties can fulfill the clinical requirements of petitioner's program through the use of interpreter services or other auxiliary educational aids. Similarly, the parties did not investigate the feasibility of adjusting the clinical requirements themselves to accommodate students with hearing handicaps no more severe than respondent's.

Petitioner argues (Pet. Br. 49-50) that the findings of the district court are sufficient to absolve the College of any charges of discrimination in violation of Section 504 and the HEW regulations. In particular, petitioner emphasizes the district court's conclusion (Pet. App. 18a) that "it would be difficult and, in fact, dangerous for [respondent] to even attempt the clinical portion of the training program." But this statement, and the resulting legal ruling that respondent's rejection on the basis of her impaired hearing did not deprive her of her rights under Section 504, are both based on the erroneous assumption that petitioner is not obligated to identify and imple-

ment feasible program modifications that will *enable* handicapped persons to participate safely. The district court simply did not consider whether it is feasible to change the nursing program to accommodate respondent or to provide interpreter services during those portions of the clinical training for which respondent's hearing may be inadequate.

The record evidence relevant to these matters is sparse. The director of petitioner's nursing program at the time respondent sought admission testified that "[t]here is the possibility that [respondent] could [accomplish all of the skill levels in the clinical program] if she just had one person with her to completely supervise and make sure that she understood what was being said and what she was to do and that she understood her patient" (A. 53a). The same witness stated, however, that petitioner was not prepared to provide respondent with the supervision necessary to compensate for her handicap in the clinical program (*ibid.*). Other faculty members testified that it would be impossible for a person with a hearing impairment like respondent's "to meet the needs of patients in critical care areas" (A. 71a) or in noisy areas containing machinery and equipment (A. 96a). One of these witnesses expressed concern (A. 77a) that providing adequate supervision for respondent in the clinical program might entail prohibitive expense, but she did agree (A. 74a) that there are probably many areas in the field of nursing in which a person like respondent could function safely. Both the district court and the court of appeals acknowledged (Pet. App. 6a n.6, 20a) that respondent could perform satisfactorily as a registered nurse in a number of settings, "such as in industry or perhaps a physician's office."

All the testimony by petitioner's witnesses in the district court was colored by the communications between petitioner and the North Carolina Board of Nursing at the time respondent's application for the Associate Degree program was pending. Referring to letters received from the Executive Director of the State Board in response to inquiries by petitioner (see A. 132a-134a, 138a-139a), several witnesses stated that respondent was not admitted to the nursing program at least in part because, even if she were to complete her training successfully, she could not be licensed as a registered nurse in North Carolina (A. 45a, 70a-71a, 74a, 82a). A faculty member testified (A. 74a) that a nursing student

> must be recommended by the faculty saying that she is safe in all areas before she can take her state Board. * * * [W]e can't say that we are preparing [her] to function in one area, whether it be industrial nursing or some other area. We have to say that she is safe in every area when we recommend her to the Board, [and] that means the critical care areas, too.

The district court's findings of fact and conclusions of law stressed the significance of the letters received by petitioner from the State Board (Pet. App. 15a, 18a). The court stated that "the single major factor in [petitioner's] refusal to allow admissions to [re-

spondent] was her projected inability to be licensed as a Registered Nurse after graduation" (Pet. App. 18a).

Petitioner's asserted reliance on the State Board's licensing requirements as a justification for rejecting respondent's application is faulty for several reasons. First, the State requirements are by no means as clear as petitioner, the district court, and the State Board's Executive Director suggest. The Executive Director's first letter (A. 132a) stated that "[respondent's] hearing disability can preclude her being safe for practice in any setting allowed by a license as an RN, or by a license as LPN [*i.e.*, a licensed practical nurse]." But, of course, respondent *has* been licensed as a practical nurse for the last 12 years, and her license was renewed by the State Board and signed by the Board's Executive Director *after* all the events surrounding respondent's application for the Associate Degree program had occurred (A. 153a). Therefore, there is at least some question whether the Executive Director's discouraging letters to petitioner conform with the Board's own practice regarding respondent and other persons with impaired hearing.

Further suspicion concerning the authoritativeness of the Executive Director's letters arises from an examination of North Carolina law governing the practice of nursing. The relevant statutory provisions are contained in Article 9 of the Chapter entitled "Medicine and Allied Occupations," N.C. Gen. Stat. § 90-158 *et seq.* (1975 Repl.). Section 90-170 lists the qualifications required of an applicant for the

examination leading to certification and licensing as a registered nurse. The statute does not mention physical condition. An applicant must be a high school graduate of good moral character who has completed the course of study at and has graduated from an "educational unit in nursing" accredited by the State Board in accordance with the standards set forth in N.C. Gen. Stat. § 90-171.7 (1975 Repl.). Those standards impose no physical requirements for the students who may be educated in accredited nursing programs.[21] The only reference to physical ability in Article 9 is found in § 90-171.5(7) (1975 Repl.). That section provides that the Board may revoke or suspend any license to practice nursing or deny any application for such a license if the Board finds on the basis of competent evidence adduced at a hearing that the licensee or the applicant is "mentally or physically incompetent to practice nursing." "Physical incompetence" is not defined. The provision suggests that the Board considers physical disabilities only in the context of individual proceedings focusing

[21] The Standards for Educational Units in Nursing, promulgated by the North Carolina Board pursuant to its authority under Article 9, state only that "[c]riteria for screening applicants for admission to an educational unit must include assessment of: * * * Physical and emotional health which would indicate applicant's ability to provide safe nursing care to the public." The Board's Standards do not preclude the use of auxiliary educational aids by handicapped students, nor do they provide that every nursing student must be able to perform all the functions currently required in existing clinical programs. The requirement of general physical health should not be read to exclude all handicapped students whose nonphysical abilities would qualify them for admission to nursing programs.

on the qualifications of particular licensees whose fitness is for some reason questioned or particular applicants at the time they seek certification.

Moreover, the provisions in Article 9 that now govern the practice of nursing in North Carolina have been repealed, effective July 1, 1981. See 1977 N.C. Sess. Laws, ch. 712, § 3. The recent statute creates a Governmental Evaluation Commission to review all the programs and functions scheduled for termination under the act and to make recommendations to the General Assembly on whether the regulatory programs and agencies under review "should be terminated, reconstituted, reestablished, or continued, with or without modification of the relevant statutes." Thus, there is a substantial question whether the State Board of Nursing and its licensing requirements will continue to exist in their present form after July 1, 1981.[22] This uncertainty casts additional doubt on the legitimacy of petitioner's continued reliance on these requirements as a justification for excluding respondent from the nursing program.

It is noteworthy that, even after expressing all her misgivings concerning respondent's ability to perform satisfactorily in petitioner's clinical training

[22] Any revised State licensing requirements will presumably need to comply with N.C. Gen. Stat. § 168-6 (Michie 1976), which provides that "[h]andicapped persons shall be employed * * * in all * * * employment, both public and private, on the same terms and conditions as the ablebodied, unless it is shown that the particular disability impairs the performance of the work involved." See *Burgess* v. *Joseph Schlitz Brewing Co.*, 250 S.E. 2d 687, 689 (N.C. App. 1979) ("the Legislature intended to grant broad protection of basic rights to all persons with any type of disability").

program and later as a registered nurse, the State Board's Executive Director still did not render an unequivocal opinion that respondent could not be licensed. After making the unsupported (and apparently unsupportable) assertion that

> one requirement for eligibility to write the State Board Test Pool Examination leading to licensure as registered nurse (or to licensed practical nurse where appropriate) includes evidence that an applicant has no limitations, physically, emotionally, or mentally, to prevent the applicant from practicing nursing, after licensure, without restriction of any kind on the license

(A. 138a-139a), the Executive Director concluded by saying that she could not "predict eligibility or ineligibility for the licensing examination should [respondent] enroll in, and be allowed to complete the program several years hence" (A. 139a). The Board's own refusal to provide a definitive answer to petitioner's inquiries undercuts the validity of petitioner's reliance on State licensing requirements as a reason for excluding respondent from the nursing program.

Petitioner's insistence (Pet. Br. 44) that there can be no "partially skilled RN professionals" and "no partial RN licenses" begs the question, "Why not?" Petitioner nowhere explains why "it is absolutely essential to the safety and well-being of patients that the RN professional and the RN trainee assigned to provide nursing care be physically able to cope with all kinds of patient needs and emergencies" (*ibid.*). One of petitioner's own witnesses testified (A. 74a) that respondent could probably function adequately in

many areas of nursing, and the Director of Nursing Service at Southeastern General Hospital identified a number of positions for which respondent could appropriately be hired when openings become available (A. 140a-141a, 144a-145a). The court of appeals correctly observed (Pet. App. 6a n.6) that "the question of 'limited' verses [sic] 'unlimited' certification of [respondent] as an RN" is not presented at this stage in the litigation, but the court did comment (*ibid.*) that "if [respondent] meets all the other criteria for admission in the pursuit of her RN career, * * * it should not be foreclosed to her simply because she may not be able to function effectively in all the roles which registered nurses may choose for their careers." Even if the State Board rejects the idea of a partial license, there is still the possibility that respondent may be able to obtain certification and employment in another state. The court of appeals therefore properly remarked that under Section 504 respondent should not be excluded from the nurses' training program solely because she may not be able to perform every conceivable task that a registered nurse may be required to perform.

In sum, the letters from the State Board's Executive Director do not justify petitioner's decision to reject respondent's application on the basis of her hearing impairment. The record in this case does not establish that respondent could not be licensed in North Carolina, but in any event, Section 504 requires that a recipient of federal funds consider an applicant's ability to participate in a postsecondary

education program independent of state and local laws that may impose per se prohibitions or limits on the eligibility of handicapped persons to practice a particular occupation or profession. See 45 C.F.R. 84.10(a). The focus must be on individual ability to perform particular functions or to complete prescribed training. Petitioner must determine whether the clinical portion of its training program can feasibly be modified to accommodate a student with a hearing problem like respondent's and whether such a student can feasibly be assisted in the nursing program through the use of auxiliary educational aids, such as interpreter services. The court of appeals properly remanded this case to the district court so that the requisite inquiry under Section 504 can be pursued.[23]

---

[23] Petitioner cites (Pet. Br. 56) *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 72 (1977), for the proposition that the costs of modifying the nursing program to comply with Section 504 would impose an undue hardship. The citation is inapposite because, unlike the "reasonable accommodation" requirement under Title VII of the Civil Rights Act at issue in *Hardison*, the affirmative action requirement in Section 504 and the accompanying regulations is based on the general authority of the federal government to impose conditions on the use of federal funds by grant recipients. See *Lau* v. *Nichols*, *supra*, 414 U.S. at 569; *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143 (1947); *United States* v. *San Francisco*, 310 U.S. 16, 26 (1940). Section 504 applies only to those institutions that receive federal funds. Under its delegated power to spend for the general welfare, Congress may reasonably require recipients of federal tax dollars to spend money to comply with federal laws that protect the handicapped. Moreover, the accommodations required by the

III. RESPONDENT PROPERLY BROUGHT THIS SUIT TO VINDICATE HER RIGHTS UNDER SECTION 504 OF THE REHABILITATION ACT.

A. Respondent's Complaint States A Cause Of Action On Which Relief Can Be Granted

The third question presented in the petition for certiorari in this case is whether Section 504 creates a private right of action to enforce the statutory prohibition against discrimination on the basis of handicap in federally funded programs. The Court need not decide that question here because petitioner is a public educational institution and therefore the alleged discrimination of which respondent complains occurred under color of state law. Accordingly, respondent has stated a cause of action under 42 U.S.C. 1983 to redress an alleged deprivation, under color of state law, of the rights, privileges, and immunities secured by the laws of the United States (see A.

---

court of appeals in *Hardison* were made necessary by the employee's voluntary religious choice; they would have impinged on his fellow employees and on a valid seniority system. 432 U.S. at 80-83. Respondent and other handicapped persons do not ordinarily choose to be disabled, and adjustment of petitioner's program to aid the handicapped would not implicate the Establishment Clause or impinge directly on any other student. Finally, petitioner presented no evidence in the district court to support its conclusory assertions that program modifications would be unreasonably costly, in light of the federal financial assistance received and other pertinent considerations (A. 77a). The district court made no findings on this issue. Accordingly, none of the considerations underlying this Court's decision in *Hardison* are present here.

5a).[24] This Court has acknowledged that Section 1983 may be invoked to vindicate federal statutory as well as constitutional rights (see, *e.g.*, *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 543 n.7 (1972)), and the district court in this case recognized that respondent's suit is properly viewed as an action under Section 1983 to enforce the antidiscrimination provision in Section 504 of the Rehabilitation Act.[25]

---

[24] Respondent's initial complaint (A. 2a-8a) did not expressly allege a basis of federal jurisdiction applicable to this action. An amendment to the complaint (A. 9a) cited 28 U.S.C. 1337 as a possible jurisdictional base. A more appropriate citation would have been 28 U.S.C. 1343(4), which grants the federal district courts jurisdiction over civil suits "under any Act of Congress providing for the protection of civil rights * * *." Section 504 of the Rehabilitation Act is such a statute. As one Senator recently remarked in the course of floor debate on the 1978 amendments to the Act:

> [T]here is a great new civil rights struggle going on in our country. Long-neglected Americans are seeking, with good reason, their full and equal share of the rights to which all are entitled in our land. Accessibility for handicapped individuals must be viewed in that context—it is an issue of civil and human rights. I believe strongly that we must assure that the rights and opportunities accorded every other American are accorded to handicapped Americans.

124 Cong. Rec. S15590 (daily ed. Sept. 20, 1978) (remarks of Sen. Cranston). See also S. Rep. No. 95-890, *supra*, at 39.

[25] The court of appeals erroneously declared (Pet. App. 3a) that the district court's opinion includes an implicit finding that respondent "could pursue a private right of action under Section 504 * * *." This remark ignores the district court's careful description of the theory of respondent's lawsuit. The district court stated (Pet. App. 19a): "[Respondent] contends * * * that by violating [Section 504, petitioner] has denied her rights guaranteed under the 'law of the United

See Pet. App. 19a; A. 15a. See also *Cannon* v. *University of Chicago*, No. 77-926 (argued Jan. 9, 1979), Brief for the Federal Respondents 22-24 & n.16, 57.[26] This case therefore does not require the Court to decide whether Section 504 itself creates a private right of action. That question can best be resolved in a suit alleging that a private recipient of federal funds has discriminated against a handicapped applicant or prospective employee. See, *e.g.*, *Trageser* v. *Libbie Rehabilitation Center*, 590 F.2d 87 (4th Cir. 1978), petition for cert. pending, No. 78-1454. Because the alleged discrimination in such a case would not occur under color of state law, the plaintiff could not state a cause of action under 42 U.S.C. 1983 and would need to rely directly on Section 504.

Should the Court nevertheless decide to address petitioner's third question in this case, it should hold that Section 504 does create an implied private right of action for the enforcement of the statutory prohibition against discrimination on the basis of handicap in federally funded programs. The arguments advanced by the federal respondents in *Cannon* in support of a private remedy under Section 901 of the Education Amendments of 1972, 20 U.S.C. 1681, are equally applicable here. Section 504 was consciously modeled on Section 901, and on Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d. Congress

States,' thus giving rise to a cause of action under 42 U.S.C. § 1983."

[26] Copies of the Brief and Reply Brief for the Federal Respondents in *Cannon* have been sent to petitioner's counsel.

expected the three statutes to be enforced similarly. See, *e.g.*, S. Rep. No. 93-1297, *supra*, at 39-40.

Indeed, in a significant way, the support in the legislative history for a private right of action under Section 504 is even stronger than it is for the availability of private suits under Section 901. The briefs for the federal respondents in *Cannon* make this point in some detail. See Br. 35-40; Reply Br. 14-15. The primary piece of evidence is the Senate committee report on the 1974 amendments to the Rehabilitation Act. That report, issued by the same Congress that enacted Section 504 in its 1st Session one year earlier, stated explicitly that proper implementation of the statute would "permit a judicial remedy through a private action." S. Rep. No. 93-1297, *supra*, at 40.[27] See also S. Rep. No. 93-1139, 93d Cong., 2d Sess. 24-25 (1974). The report indicated that the same means of enforcement would also be available under Section 901 and Section 601. Whatever discount one must apply when using the 1974 report as an aid to the interpretation of the latter two statutes enacted by earlier Congresses,[28] the report's authoritativeness as far as Section 504 is concerned is indisputable.

The conclusion that Section 504 does create a private right of action is confirmed by the 1978 amendments to the Rehabilitation Act and the accompany-

[27] The relevant passages from the Senate report are reproduced at considerable length at pages 36-37, *supra*.

[28] Cf. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 541-542 (1962) (plurality opinion); *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

ing legislative materials. The new Section 505(b) of the Act (to be codified at 29 U.S.C. 794a(b)), 92 Stat. 2983, authorizes the award of attorney's fees to parties other than the United States who prevail in suits to enforce the provisions of Title V, including Section 504.[29] The Senate committee report states:

> The committee believes that the rights extended to handicapped individuals under title V * * * are, and will remain, in need of constant vigilance by handicapped individuals to assure compliance, and the availability of attorney's fees should assist in vindicating private rights of action in the case of section 502 and 503 cases, as well as those arising under section 501 and 504.

S. Rep. No. 95-890, *supra*, at 19.

The floor debate in the Senate also evidences Congress' intention to permit enforcement of Section 504 through private litigation. Senator Cranston stated that "an important reason for the inclusion of the attorneys' fees provision in [the 1978 amendments] is to encourage appropriate private litigants to bring actions under title V of the Rehabilitation Act." 124 Cong. Rec. S15593 (daily ed. Sept. 20, 1978). See also *ibid.* (remarks of Sen. Bayh); *id.* at S15590-S15591 (remarks of Sen. Cranston); 124 Cong. Rec.

[29] Section 505(b) provides that:

> In any action or proceeding to enforce or charge a violation of a provision of [Title V of the Rehabilitation Act], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

S18999-S19000 (daily ed. Oct. 14, 1978) (remarks of Sen. Stafford).[30]

Testimony during the House committee hearings on Section 504 shortly after issuance of the HEW regulations demonstrates that a private remedy is necessary if the statute is to provide an effective guarantee of rights for handicapped persons. David Tatel, Director of HEW's Office for Civil Rights, testified that

[30] Thirty-two states as amici curiae argue that the new Section 505(a)(2) of the Act, added by the 1978 amendments (92 Stat. 2983; to be codified at 29 U.S.C. 794a(a)(2)), reveals Congress' intention to preclude private suits under Section 504. Amici Br. for the Commonwealth of Massachusetts, *et al.* 23-27. This is incorrect. Section 505(a)(2) provides:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act.

This amendment merely codifies HEW's existing practice of enforcing Section 504 through administrative procedures identical to those employed under Section 601 of the Civil Rights Act. Congress always expected enforcement of Section 504 and Section 601 to be consistent (see S. Rep. No. 93-1297, *supra*, at 39-40), and in 1978, the legislators simply wrote this expectation into the statute. See S. Rep. No. 95-890, *supra*, at 19. In *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978), four Justices acknowledged that Title VI of the Civil Rights Act can be enforced through a private action. See slip op. 12-14 (Stevens, J., concurring in the judgment in part and dissenting in part). Many lower federal courts have reached the same result. See cases cited in Brief for the Federal Respondents in *Cannon* 20. The new Section 505(a)(2) provides that Section 504 should be enforced by the same methods as Title VI, and those methods include private suits.

"the private right of action for individuals [should] be preserved[, because] HEW is not in a position and does not have the resources to do the whole job." *Implementation Hearings*, *supra*, at 358. A witness representing the Children's Defense Fund stated that private enforcement of Section 504 is important because "the legal power of [the Office for Civil Rights] and many of the other federal enforcement agencies is severely limited in terms of the kind of relief that can be ordered for individuals. OCR lacks legal authority to order the specific relief desired by a handicapped complainant. It can only use its sledgehammer to cut off all funds." *Id.* at 265-266. See also *id.* at 257-258, 366; Brief for the Federal Respondents in *Cannon* 49-51.

The weight of judicial authority favors an affirmative answer to the question whether Section 504 creates a private right of action. Last Term, this Court reviewed a decision in which a three-judge federal district court resolved a private suit on constitutional grounds and did not rule on appellees' claim under Section 504. The Court vacated the judgment below and remanded "with directions to decide the claim based on the federal statute, § 504 of the Rehabilitation Act of 1973 * * *." *Campbell* v. *Kruse*, 434 U.S. 808 (1977). This disposition implicitly recognized that a private action can be maintained under Title V. Several lower federal courts have explicitly reached the same conclusion. See *Leary* v. *Crapsey*, 566 F.2d 863 (2d Cir. 1977); *United Handicapped Federation* v. *Andre*, 558 F.2d 413 (8th

Cir. 1977); *Kampmeier* v. *Nyquist*, 553 F.2d 296 (2d Cir. 1977); *Lloyd* v. *Regional Transportation Authority*, 548 F.2d 1277 (7th Cir .1977);[31] *Vanko* v. *Finley*, 440 F. Supp. 656 (N.D. Ohio 1977); *Whitaker* v. *Board of Higher Education*, 461 F. Supp. 99 (E.D.N.Y. 1978); *Davis* v. *Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978); *Bartels* v. *Biernat*, 427 F. Supp. 226 (E.D. Wis. 1977); *Hairston* v. *Drosick*, 423 F. Supp. 180 (S.D. W.Va.). See also *Camenisch* v. *University of Texas*, No. A-78-CA-061 (W.D. Tex. May 17, 1978), appeal pending; *Crawford* v. *University of North Carolina*, 440 F. Supp. 1047 (M.D. N.C. 1977) (both ordering preliminary injunctive relief and then staying the actions pending administrative efforts to obtain compliance with Section 504). But see *Barnes* v. *Converse College*, Civ. No. 77-1116 (D.S.C. Mar. 31, 1978), appeal pending, No. 78-1440 (4th Cir.); *Doe* v. *New York University*, 442 F. Supp. 522 (S.D.N.Y. 1978) (both dismissing private

---

[31] Like the private respondents in *Cannon*, petitioner here argues (Pet. Br. 56-59, 63-66) that the Seventh Circuit recognized a private right of action in *Lloyd* only because HEW had not yet issued regulations establishing an administrative mechanism for obtaining compliance with Section 504. With the issuance of the HEW regulations, petitioner contends, the rationale of *Lloyd* disappeared, and the case should no longer be cited in support of private suits under Section 504. Moreover, petitioner maintains, cases relying on *Lloyd* as authority for the enforcement of Section 504 through private litigation are now discredited and should not be followed. These arguments are answered in the briefs for the federal respondents in *Cannon* (Br. 38-40; Reply Br. 14-15), and we do not repeat that discussion here.

suits under Section 504 for failure to exhaust administrative remedies).[31a]

Many of the cases cited above involve local governments or other public institutions as defendants, and in those instances the plaintiffs' cause of action could have been based on 42 U.S.C. 1983 rather than directly on Section 504. This very fact provides additional impetus for the judicial recognition of a private right of action under Section 504. Congress did not envision different enforcement schemes for that statute depending on the public or private character of the recipients of federal aid. Section 504 was intended to prohibit discrimination against the handicapped in all federally funded programs, and if private suits to enforce this provision may be brought against public entities under Section 1983, there is no reason why they should not also be available to redress discrimination by private recipients of federal monies. See Brief for the Federal Respondents in *Cannon* 25-26.[32]

[31a] In July 1977, two and a half months after the issuance of HEW's regulations, the district court in *Barnes* entered a preliminary injunction directing the defendant college to provide interpreter services to assist plaintiff during her summer school classes. The court required plaintiff to post a security bond to guarantee that the college will be reimbursed for the cost of the interpreter if future litigation establishes that the college is not obligated to provide such services. See 436 F. Supp. 635 (D.S.C. 1977).

[32] Petitioner contends (Pet. Br. 61) that *Trageser* v. *Libbie Rehabilitation Center, supra*, 590 F.2d at 89, establishes that there can be no private right of action under Section 504 "unless a primary objective of the federal financial assistance [to the program involved] is to provide employment." This argument is based on a misreading of the court of appeals' opinion in *Trageser*. The case held only that Section 504 cannot support a private *employment* discrimination suit unless a principal purpose of the federal funding involved is to provide employment. The decision did not undercut the Fourth Circuit's finding of a private right of action in this case, because respondent did not sue to remedy employment discrimination. *Id.* at 90 n.12. We believe that *Trageser* was wrongly decided, but in any event it does not affect the outcome here.

B. Recourse to HEW's Administrative Complaint Procedure is Not a Prerequisite to a Private Suit Under Section 504

Petitioner contends (Pet. Br. 56-66) that respondent's suit should be dismissed because she has not filed an administrative complaint concerning petitioner's alleged discriminatory rejection of her application for the Associate Degree Nursing Program. The first response to this assertion is that, when respondent's suit was filed in September 1975, no administrative complaint procedure was available. The administrative enforcement mechanism for Section 504 was not established until April 1977, when HEW promulgated regulations making the enforcement procedures developed earlier under Title VI of the Civil Rights Act applicable to Section 504 as well. The district court dismissed respondent's action in December 1976, several months before she could conceivably have filed an administrative grievance. Because no administrative remedy of any kind was available at the time respondent sought judicial relief, petitioner's exhaustion argument raises a question that is not present in this case.

Moreover, neither the district court nor the court of appeals has rendered any decision on the exhaustion issue, and, accordingly, there is no ruling in that regard currently before this Court for review. The court of appeals suggested that the district court might "deem it advisable" to consider the doctrines of administrative exhaustion and primary jurisdiction on remand, but neither court has expressed any opinion on whether or how those legal constructs apply in the context of Section 504. The final question presented by petitioners therefore is not ripe for this Court's consideration.

If the Court reaches the issue, however, it should hold that a handicapped person who has suffered discrimination in violation of Section 504 need not file an administrative complaint before initiating legal action against the offending recipient of federal funds. The arguments made in this connection by the federal respondents in *Cannon* (see Br. 58-59 n.36; Reply Br. 4-6) are equally applicable here, because the HEW regulations governing Title IX of the Education Amendments and Title V of the Rehabilitation Act incorporate the same enforcement procedures, *viz.*, the ones first designed to implement Title VI of the Civil Rights Act. See 45 C.F.R. 84.61 and 86.71 (both incorporating 45 C.F.R. 80.6-80.10 and Part 81). The fund termination mechanism established in these regulations is not designed primarily to redress individual grievances of persons who have been subjected to illegal discrimination in programs receiving federal financial assistance. While it is true that such persons may trigger an administrative in-

vestigation by filing a complaint with the appropriate funding agency, they may not participate as parties in the investigation or in subsequent enforcement proceedings. A voluntary compliance agreement between the agency and the recipient of funds need not include relief for the specific benefit of the original complainant. In short, an exhaustion requirement is inappropriate under Title VI, Title IX, and Title V, because respondent and other persons similarly situated do not have any real administrative remedies to exhaust.

When the HEW regulations implementing Section 504 were considered at House hearings held in September 1977, witnesses gave conflicting testimony on the question whether Congress should require resort to the HEW complaint procedure as a precondition to private suit under Section 504. Compare *Implementation Hearings, supra*, at 208, 209 (remarks of witnesses Orleans and Peltason) (favoring enactment of a statutory exhaustion requirement), with *id.* at 266, 276 (remarks of witnesses Yohalem and Gashel) (opposing such a requirement). Having heard these disparate views, Congress did not include an exhaustion provision in the 1978 amendments to the Rehabilitation Act. This failure to respond to a clear invitation from proponents of the view espoused by petitioner is perhaps not by itself dispositive of the exhaustion question, but it surely offers no support for the proposition that an administrative grievance must be filed and resolved before Section 504 may be enforced through private litigation.

Finally, petitioner suggests (Pet. Br. 64-66) that this Court should apply the "doctrine of primary jurisdiction" and direct the district court to stay further proceedings until respondent has attempted to obtain voluntary compliance with Section 504 through HEW's administrative complaint procedure. But, as the federal respondents argued with respect to Title IX in *Cannon* (Br. 59-60 n.36; Reply Br. 6-9), there is no *a priori* reason for federal courts to defer to the special competence of an administrative agency when an antidiscrimination statute is at issue. Although the substantive regulations promulgated under Section 504 may be somewhat more intricate than their counterparts under Title VI and Title IX, federal courts are well suited for the adjudication of claims involving alleged deprivation of civil rights, and that fact is not changed because a particular statute is intended to protect persons whose unique problems have not previously commanded extensive legislative attention. If petitioner were correct, and federal courts were routinely required to delay proceedings in private suits until administrative investigations and compliance efforts could be completed, the major contribution that private litigation can make to the effective enforcement of Section 504 would be lost. Courts may await administrative action when, in an individual case, a proper need arises for the court to ascertain the views of the funding agency on the events in question. But there should be no general requirement that judicial proceedings be postponed until administrative action has been concluded.

CONCLUSION

The judgment of the court of appeals should be affirmed, and the Court should clarify the court of appeals' instructions to the district court, in accordance with the views expressed herein.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

PETER BUSCEMI
ANDREW J. LEVANDER
Assistants to the Solicitor General

BRIAN K. LANDSBERG
JESSICA DUNSAY SILVER
VINCENT F. O'ROURKE, JR.
STEPHEN L. MIKOCHIK
Attorneys

APRIL 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 291504 377